

EXHIBIT A

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-01789-smb

4 - - - - - x

5 In the Matter of:

6 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC,

7 Debtor.

8 - - - - - x

9 Adv. Case No. 10-05355-smb

10 - - - - - x

11 IRVING H. PICARD, Trustee for the

12 Liquidation of Bernard L. Madoff Investment

13 Securities LLC,

14 Adv. Pro. No. 10-05355 (SMB)

15 Plaintiff,

16 v.

17

18 ABN AMRO BANK (IRELAND) LTD. (f/k/a FORTIS PRIME FUND

19 SOLUTIONS BANK (IRELAND) LIMITED) and

20 ABN AMRO CUSTODIAL SERVICES (IRELAND) LTD. (f/k/a FORTIS

21 PRIME FUND SOLUTIONS CUSTODIAL

22 SERVICES (IRELAND) LTD.),

23 Defendants.

24 - - - - - x

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Page 2

1 - x

2 Adv. Case No. 10-04658-smb

3 - x

4 IRVING H. PICARD, Trustee for the Substantively

5 Consolidated SIPA Liquidation of Bernard L. Madoff

6 Investment Securities LLC and Bernard L. Madoff,

7 Plaintiff,

8 v.

9 CAROL NELSON,

10 Defendant,

11 - x

12 Adv. Case No. 10-04377

13 - x

14 IRVING PICARD, Trustee for the Liquidation

15 of Bernard L. Madoff Investment Securities

16 LLC,

17

18 Plaintiff,

19 v.

20 CAROL NELSON, individually and as joint

21 tenant and STANLEY NELSON, individually

22 and as joint tenant,

23

24 Defendants.

25 - x

Page 3

1 - - - - - x

2 Adv. Case No. 10-03800-smb

3 - - - - - x

4 PICARD,

5

6 Plaintiff,

7 v.

8 Fairfield Greenwich Group (In re Fairfield Sentry Ltd.),

9

10 Defendants.

11 - - - - - x

12

13 U.S. Bankruptcy Court

14 One Bowling Green

15 New York, NY 10004

16

17 September 25, 2019

18 10:19 AM

19

20

21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: JONATHAN

Page 4

1 Hearing re: Adv. Case No. 10-05355-smb - PICARD v. ABN AMRO
2 BANK (IRELAND)

3 Trustee's Motion for Leave to Amend

4

5 Adv. Case No. 10-04377-smb - PICARD v. CAROL NELSON et al

6 Motion to Dismiss for Lack of Subject Matter Jurisdiction

7

8 Adv. Case No. 10-04658-smb - PICARD v. NELSON

9 Motion to Dismiss for Lack of Subject Matter Jurisdiction

10

11 Adv. Case No. 10-03800-smb - PICARD v. Fairfield Greenwich
12 Group

13 Conference (also applies to Adv. Pro. Nos. 09-01239 & 12-
14 01701)

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 CLERK: Please be seated.

3 THE COURT: Good morning.

4 MR. WARSHAVSKY: Good morning.

5 CLERK: Fairfield. Fairfield.

6 THE COURT: Good morning. I scheduled the
7 conference because I got your request to extend the
8 schedule, and I had two points. First is I wouldn't give an
9 open-ended extension. Do you have a date set to start the
10 mediation?

11 MR. WARSHAVSKY: Owen Warshavsky for the Trustee,
12 Your Honor. We do. As you can see by the bench behind us,
13 there are several parties here.

14 THE COURT: Mh hmm.

15 MR. WARSHAVSKY: And so we're scheduling it. We
16 have an initial meeting just myself and Mr. Kazanoff, the
17 counsel for most defendants or the corporate -- I'll let him
18 explain who he's representing, but for the majority of the
19 defendants. We -- and we'll be meeting with Mr. Davis in --
20 I think it's October 17th. We're trying to schedule a
21 follow-up meeting for the different parties. We've been
22 working through a few issues to try and narrow the scope of
23 the mediation.

24 THE COURT: Mh hmm.

25 MR. WARSHAVSKY: In particular, Your Honor, I

1 think we're focused on the -- there's differences in
2 accounting. We've been working through those issues over
3 the summer to try and narrow it down to --

4 THE COURT: So how long do you think this'll take.

5 MR. WARSHAVSKY: I'll ask Mr. Kazanoff to respond.

6 MR. KAZANOFF: You mean in terms of be ready to
7 have a full-blown mediation or to complete it?

8 THE COURT: Well, to complete the mediation. As I
9 said, I'm loathe to give an open-ended extension. I'll give
10 you the time you need, but -- and maybe you have to come
11 back, but I don't want to give you an open-ended extension.

12 MR. KAZANOFF: No, no. We understand, Your Honor.
13 I -- you know, our hope -- at least my -- at least my hope
14 is that, you know, now we're going to involve -- we've
15 invited the Sentry liquidator --

16 THE COURT: Okay.

17 MR. KAZANOFF: -- into the mediation. Mr.
18 Molten's here, if you have any questions about that. You
19 know, the scope of the mediation is broad, so to -- but let
20 me -- let me answer your question. When can we be done?
21 Listen, I think it's a -- I think we -- I hope we have a
22 very serious mediation session that hopefully yields
23 concrete results by the end of the year. But I would be --
24 I think it would be unreasonable to suggest it's going to
25 resolve everything, but I'm hoping that it can significantly

1 narrow the issues.

2 THE COURT: Okay.

3 MR. KAZANOFF: Which is what we're trying to --

4 THE COURT: Does anyone else want to be heard?

5 What I'll do is I'll give you the extension to the end of
6 the year. I'll schedule another conference so you don't
7 have to submit another order at some point in November, and
8 you can give me an update on the status, whether it's
9 actually progressing or the case has to be tried. Okay.

10 MR. KAZANOFF: And, Your Honor, so just to be
11 clear, we can hold off on putting in our reply brief to the
12 opposition?

13 THE COURT: Well, yeah. It's basically --
14 everything stops. Why don't we say November 26th? That's
15 after Thanksgiving. Okay. So I'll adjourn this conference
16 to November 26th.

17 MR. KAZANOFF: Thank you, Your Honor.

18 THE COURT: And you can submit an order. You
19 don't have to do a stipulation, so you don't have to bother
20 to get signatures, which provides for this.

21 Okay. Thanks.

22 MR. KAZANOFF: Thank you, Your Honor.

23 MR. WARSHAVSKY: Thank you, Your Honor.

24 THE COURT: Picard versus Nelson.

25 MS. CHAITMAN: Good morning, Your Honor.

1 THE COURT: Good morning.

2 MS. CHAITMAN: Helen Davis --

3 THE COURT: Please keep your voice up.

4 MS. CHAITMAN: Sure. Helen Davis Chaitman,
5 Chaitman LLP, on behalf of the Nelsons.

6 Your Honor, we've moved to dismiss the complaints
7 on the grounds that there's no Article 3 jurisdiction
8 because based on the Court's decisions in Avellino, Irving
9 Picard does not have standing to recover funds that were
10 transferred by Madoff individually.

11 THE COURT: But aren't you assuming the answer to
12 the merits of whether they've proved their claim? In other
13 words, they would have to prove -- or the trustee would have
14 to prove that the LLC made a transfer? And that's -- that
15 goes to the merits of its claim. I mean, what's -- in other
16 words, what's the difference between what I would have to
17 decide factually to resolve your motion and what I would
18 have to decide factually to resolve whether or not they're
19 entitled to a judgment?

20 MS. CHAITMAN: Well, there are a number of other
21 issues that are raised by the trial in the evidence. The
22 jurisdictional issue I think has to be determined logically
23 before you reach --

24 THE COURT: No, I understand that, but if I
25 conclude based on the evidence that the LLC didn't make the

Page 12

1 transfers, you lose. If I decide that the LLC did make the
2 transfers, then even under your theory, they have standing,
3 right?

4 MS. CHAITMAN: Well, there are certain documents
5 that were not put into evidence at the trial that are part
6 of the record here. And I think that, for example, just to
7 take one example, the Caraballo 2017 declarations, which we
8 contend were procured with a fraudulent intent by the
9 Trustee, we've now put into -- before the Court the report
10 of Mr. Greenblatt from 2012. Mr. Greenblatt is one of the
11 trustee's experts. In 2012, he issued a report in which he
12 opined upon the documents that were produced by Caraballo in
13 2017. And we've annexed all the Bates numbers so the Court
14 can see that the Bates numbers from Mr. Greenblatt's report
15 from 2012 included the documents that purportedly were
16 produced by JPMorgan Chase in 2017.

17 THE COURT: I didn't think that they were produced
18 by JPMorgan in 2017. I just that that's when her
19 certification was up.

20 MS. CHAITMAN: Right, but the Trustee has never
21 produced the certifications for the original production.

22 THE COURT: But this is for the trial. He wanted
23 to get those documents into evidence, so he needed a
24 custodian to identify them. They could've been produced 10
25 years ago, but the trial was in May.

1 MS. CHAITMAN: I'm not aware of anything in the
2 record which suggests that the Caraballo 2017 declaration
3 was needed to put things in evidence. Number one because
4 there had to have been a custodian of records affidavit at
5 the time of the original production.

6 THE COURT: But why?

7 MS. CHAITMAN: I'm sorry?

8 THE COURT: Why? You need the custodial affidavit
9 for trial. You don't need it before that.

10 MS. CHAITMAN: Judge, if that were their intent,
11 they would've provided me with a copy of it. They didn't
12 provide me with a copy of it until a week before the trial.
13 It's -- in my -- based on my review of everything --

14 THE COURT: I understand your argument that they
15 produced a lot of documents (indiscernible), but -- and they
16 should be excluded for that reason, but I don't understand
17 the argument that documents were produced in 2012, and her
18 declaration should -- or her custodial affidavit, which was
19 designed -- you get documents into evidence should speak as
20 of 2012.

21 MS. CHAITMAN: You know what, Judge? I'm not --
22 the documents were probably produced in 2009. I assume that
23 the Trustee used the period after his appointment to get all
24 the JPMorgan Chase documents, which of course were
25 essential. I assume those were produced in 2009. We never

Page 14

1 saw the custodial affidavit that would've been -- the
2 would've accompanied that production. We saw later
3 custodial affidavits that didn't contain the representation
4 that that --

5 THE COURT: Well, I saw one for 2015, I think,
6 that didn't even refer to BLMIS, so --

7 MS. CHAITMAN: Exactly. Exactly. But if -- even
8 -- the productions that were made available to the callback
9 defendants were in the e-data room, those were -- those
10 predated significantly even the 2015 Caraballo declaration.
11 So I think it's --

12 THE COURT: But isn't the question who owns the
13 account?

14 MS. CHAITMAN: The question is who owns the
15 account.

16 THE COURT: Right.

17 MS. CHAITMAN: There is not a shred of evidence
18 that the LLC owns the account.

19 THE COURT: Let me ask you a question. Is this --
20 I was looking through some of the exhibits, and this was one
21 of the trial exhibits which you offered, and it's the
22 deferred prosecution agreement between the U.S. attorney and
23 JPMorgan. Paragraph 7 says Bernard L. Madoff ran the
24 largest Ponzi scheme in history through Bernard L. Madoff
25 Investment Securities LLC and its predecessor and affiliates

1 collectively Madoff Securities. And then it says Madoff
2 Securities had a continuing banking relationship with
3 JPMorgan and that the 703 account was part of -- part of
4 that relationship.

5 Why would the government say that LLC had an
6 account if it didn't?

7 MS. CHAITMAN: You know, Judge, I was not a party
8 to that proceeding, obviously.

9 THE COURT: But you -- but you offered this
10 document into evidence.

11 MS. CHAITMAN: But not for that purpose.

12 THE COURT: But I can read. That's what it says.

13 MS. CHAITMAN: Judge, I understand that. But the
14 fact of the matter is you can't transfer a bank account
15 without having a document which requests a transfer of the
16 bank account. These -- if you just look at it logically,
17 Judge, Madoff testified that by the time he formed the LLC,
18 he recognized he was going to go under. And obviously what
19 he did was he tried -- he formed the LLC.

20 THE COURT: He testified to that?

21 MS. CHAITMAN: Yes, he did in his --

22 THE COURT: He formed the LLC in 2001.

23 MS. CHAITMAN: He testified that at that time he
24 formed the LLC. I asked him in his deposition, since he'd
25 been in business for -- since the 1960s -- what happened in

1 2001 that he formed an LLC.

2 THE COURT: Mh hmm.

3 MS. CHAITMAN: And his answer was he realized he
4 was never going to get out of the situation he was in, and
5 he formed the LLC for protection. What did he do then? He
6 notified everyone that did business with his sons through
7 the LLC that he had formed the LLC. He didn't notify
8 JPMorgan Chase. He didn't notify any of the investment
9 advisory customers. He was clearly doing that in order to
10 protect his sons and insulate his sons away from the
11 investment advisory business where he had been perpetrating
12 a fraud.

13 So the fact -- he knew -- he certainly knew --
14 when you look at the letters that he wrote to --

15 THE COURT: How would his sons be implicated if he
16 was running a sole proprietorship any more than they would
17 be -- or less than they would be implicated if he was
18 running it as an LLC?

19 MS. CHAITMAN: He was not running the sole -- what
20 he -- the investment advisory business was never -- based on
21 any evidence was never run by the LLC. It was -- the boys
22 were running a legitimate trading business. He was running
23 the LLC.

24 THE COURT: Dubinsky testified, and I found his
25 testimony credible, that it was only one business. And, in

1 fact, I think the government information that accompanied
2 deferred prosecution agreement, but maybe the statement of
3 facts in the deferred prosecution agreement said that there
4 was one business, and it had a proprietary trading, market
5 making, and investment advisory business.

6 MS. CHAITMAN: You know what, Judge? I --

7 THE COURT: But that brings me back to my original
8 question. I don't -- I -- this motion just seems to be the
9 same argument that they failed to prove that there was a
10 transfer.

11 MS. CHAITMAN: It's much -- it's much more
12 important than that, Judge. This goes to the -- whether the
13 Trustee actually has constitutional standing to be suing in
14 any of the callbacks.

15 THE COURT: Well, why wouldn't he have
16 constitutional standing if he's alleging non-speculative
17 concrete injury?

18 MS. CHAITMAN: He doesn't have that injury. You
19 held that in Avellino.

20 THE COURT: No, no, no. That -- but Avellino
21 dealt with pre-2001 issues. There's no question that post-
22 2001 there was an LLC, and your argument is that the bank
23 account from which the transfers were made were personal.
24 They weren't LLC transfers. His argument is they were LLC
25 transfers. Why doesn't he have standing to make that

Page 18

1 argent?

2 MS. CHAITMAN: Well, he -- I think, look. He --
3 it's his burden to prove that the Court has jurisdiction. I
4 believe the Court does not have jurisdiction. I think it's
5 -- we -- you know, we've been litigating these cases since
6 2010 based on what I believe was a deliberate
7 misrepresentation of the most material fact, whether there
8 is jurisdiction here. I think that this impacts so many
9 people, and this deception has gone on for such a long time.
10 I feel that it's important that this go up to the Second
11 Circuit as quickly as possible.

12 THE COURT: Okay. Thank you.

13 MR. HUNT: Your Honor, Dean Hunt for the Trustee.
14 It's clear that the Court understands exactly what the issue
15 is. We believe that the post findings of fact and
16 conclusions of law raise those exact same issues.

17 I would point out, though, that I think it's
18 really not only a matter of who owns the accounts, which
19 clearly is the LLC based on the evidence, but also whether
20 or not the Debtor here held dominion and control over those
21 accounts, which the evidence clearly says is the case.

22 And based upon that and the evidence that was
23 presented at trial, the fact that they have admitted -- that
24 they now admit that they never contested that they received
25 transfers from a broker-dealer in connection with a

Page 19

1 securities contract that they don't appear to contest that
2 this is customer property, that they sought and received
3 protection of the property provided by SIPA, and at the time
4 of the two-year transfers, they were clearly our customers.

5 THE COURT: But under SIPA, they can only recover
6 a transfer by the debtor. It's treated as -- treated as
7 personal property of the debtor --

8 MR. HUNT: Agreed.

9 THE COURT: -- to circumvent, you know, state law
10 rules about who owns the property. But if the transfer were
11 made by Madoff individually, for example, that's not a
12 transform by the debtor, and Madoff is not a SIPA debtor.

13 MR. HUNT: Agreed. Agreed. But that's not the
14 case here, as indicated by the evidence. So I had a big
15 long argument ready to go. It's pretty clear you understand
16 what the issue is.

17 THE COURT: Well, I just -- look, I'll decide this
18 as part of the merits of the case. I agree with you that
19 they have the burden of proof, whether it's standing or
20 whether the transfer was made by the debtor, and I'll just
21 decide it in connection with that. I don't see the issues
22 as being separate.

23 MR. HUNT: Thank you, Your Honor.

24 THE COURT: All right. Thank you.

25 Oh, this is (indiscernible) documents. We'll go

1 through it later.

2 Picard versus ABN AMRO. Go ahead.

3 MS. GRIFFIN: Would Your Honor mind if I stayed at
4 the desk?

5 THE COURT: As long as you speak into the
6 microphone --

7 MS. GRIFFIN: Okay.

8 THE COURT: -- that's okay.

9 MS. GRIFFIN: Good morning, Your Honor. Regina
10 Griffin, counsel for the Trustee.

11 Your Honor, we're here today on the Trustee's
12 motion for leave to amend, which the Trustee submits is not
13 futile because he has successfully pled allegations that
14 meet the willful blindness standard. And the Defendant's
15 entire argument is premised on the wrong legal standard.
16 And basically what --

17 THE COURT: What's the wrong legal standard?

18 MS. GRIFFIN: So they cite to the BNP Paribas
19 decision, Your Honor, which -- in which this Court stated
20 that lack of good faith refers to knowledge of Madoff's
21 Ponzi scheme, i.e. knowledge that BLMIS was not actually
22 trading securities. But the case that is cited there is
23 actually the 546(e) decision, if you look at Your Honor's
24 citation. And in that case with the 546(e) exception, it
25 makes sense that the defendants have to actually know that

1 there's no trading and that it could be a Ponzi scheme.

2 THE COURT: So what's the test?

3 MS. GRIFFIN: The test is what the Court
4 articulated in Katz, Your Honor, and exactly what the Court
5 there said is both sides agree that if the defendant had
6 actual knowledge of Madoff's scheme it would constitute a
7 lack of good faith. But even the Trustee does not appear to
8 undertake the dubious task of plausibility pleading the
9 Defendants knowingly invested in the Ponzi scheme.

10 THE COURT: But he -- the Court's just saying what
11 the plaintiff -- what the parties agree. That's not --

12 MS. GRIFFIN: Yes, but he --

13 THE COURT: That's not a legal determination.

14 MS. GRIFFIN: But what he goes on to say, Your
15 Honor, is but both sides agree, however, that if the
16 Defendants willfully blinded themselves to the fact that
17 Madoff Securities was involved in some kind of a fraud, this
18 too might -- depending on the facts -- constitute a lack of
19 good faith.

20 THE COURT: Okay. So what's the fraud if not
21 knowledge but willful blindness of the Ponzi scheme? What's
22 the fraud that they had -- that they suspected?

23 MS. GRIFFIN: So, Your Honor, the entire willful
24 blindness standard that is developed under criminal law in
25 which Judge Rakoff bases --

1 THE COURT: I'm just asking you a question.

2 MS. GRIFFIN: Sure.

3 THE COURT: You said Judge Rakoff said that they
4 have to have some suspicion.

5 MS. GRIFFIN: Of a fraudulent --

6 THE COURT: Of a fraud.

7 MS. GRIFFIN: Of a fraudulent enterprise.

8 THE COURT: But what's the fraud in this case that
9 you say they have a suspicion of?

10 MS. GRIFFIN: Well, Your Honor, we're saying that
11 the Defendants are citing to the wrong legal standard, but
12 we're saying here --

13 THE COURT: I'm just asking --

14 MS. GRIFFIN: Sure.

15 THE COURT: -- what's the difference if the only
16 fraud is the fraud relating to the Ponzi scheme? I've had
17 this in other cases when --

18 MS. GRIFFIN: I understand, and I'm not trying to
19 be difficult. I'm trying to answer your question. What we
20 allege here is that the Fortis defendants, the employees at
21 the time specifically suspected that Madoff might not be
22 trading and didn't have custody of his assets. That's
23 exactly what we alleged, that -- in our allegations. We're
24 saying we don't need to, but we do that. And in the Optimal
25 case, Your Honor --

1 THE COURT: But if Madoff didn't have custody of
2 the assets, who did?

3 MS. GRIFFIN: That's the point. They didn't know
4 what he had custody of. He was getting --

5 THE COURT: But that's not -- but that's not a
6 fraud. The fraud is that he was telling people that he had
7 these assets when in fact he didn't have them because he was
8 using the money to pay redemptions or for his personal
9 benefit.

10 The point is -- and we can move on from this -- I
11 hear what you're saying, but the -- some kind of fraud that
12 we're talking about is that he's not trading securities.

13 MS. GRIFFIN: There is some concern that he is not
14 doing what he's saying he's doing, Your Honor. And they
15 deliberately act -- the mens rea --

16 THE COURT: But other than not trading securities,
17 what is the fraud? In other words, you've had other cases
18 where they talk about cherry picking, or they talk about
19 front running.

20 MS. GRIFFIN: Right.

21 THE COURT: That's not even in this case.

22 MS. GRIFFIN: Right.

23 THE COURT: So what's the fraud?

24 MS. GRIFFIN: I guess, Your Honor, my question to
25 you is why do you believe that at the time, they had to

1 specifically suspect exactly what he was doing rather than
2 what the Second Circuit said in Nektalov is it doesn't
3 matter if they're -- if they are subjectively correct about
4 what they suspect. But the culpable act of deliberate
5 ignorance is what we're talking about here. If they suspect
6 some sort of a fraud, and that's what Judge Rakoff said.

7 THE COURT: But what -- you know, look, let's get
8 off this, but I keep asking you the same question. Why does
9 some sort of fraud that you think they suspected or you
10 plead they suspected other than Madoff wasn't really trading
11 securities?

12 MS. GRIFFIN: And, Your Honor, that's -- you're
13 absolutely right, but that is exactly what we plead.

14 THE COURT: Okay.

15 MS. GRIFFIN: Okay. And Your Honor --

16 THE COURT: Glad we resolved that.

17 MS. GRIFFIN: Well, Your Honor, we absolutely
18 plead that the Fortis defendant suspected that he wasn't
19 trading based on the fact that, at the time, the Defendant's
20 employees were very concerned that they couldn't get two
21 independent streams to verify that the trades were actually
22 taking place.

23 THE COURT: So why'd they invest \$500 million?
24 I'll give out the benefit of the collateral. Why'd they
25 invest \$500 million and why didn't they pull the money out

1 if they suspected that it was a Ponzi scheme?

2 MS. GRIFFIN: Well, Your Honor, like Judge Rakoff
3 in Katz said is perhaps they thought they could get the
4 short-term profits -- the benefit of the short-term profits
5 while they thought they could minimize the risk.

6 And let me point out that in Katz, Your Honor, the
7 two things that the judge pointed to were, one, that they
8 considered Ponzi insurance, which they never got. And two,
9 they considered -- they created a hedge fund to minimize
10 their exposure to Madoff. Neither one of those would have
11 worked, but the point here is that where they thought they
12 could minimize the risk but still keep procuring the short-
13 term gains, that is enough that they --

14 THE COURT: How'd they minimize the risk?

15 MS. GRIFFIN: I'm sorry. I don't --

16 THE COURT: How'd they minimize the risk, by
17 investing in the private fund or the Broad Market fund?

18 MS. GRIFFIN: They mimed the risk by -- well, that
19 was the hedge to --

20 THE COURT: So that increased their risk, right?

21 MS. GRIFFIN: It certainly did, Your Honor, but
22 they also had those built-in protections that none of the
23 other Tremont investors got. That's what we need to focus
24 on here. They got protections that put them ahead of all
25 the other individual investors. These aren't one of the

1 (indiscernible) things that every Tremont individual
2 investor got. They got collateral, so the first third of
3 their money is not exposed. And I --

4 THE COURT: The last part of the -- is part of the
5 swap, the collateral.

6 MS. GRIFFIN: Yeah, and --

7 THE COURT: That's the -- that's the deal.

8 MS. GRIFFIN: And so that's one part of their
9 state of mind that goes into how are we minimizing the risk?
10 They also --

11 THE COURT: But that's the deal. They're
12 investing \$230 million, and they're going to pay three times
13 the performance of -- I guess it was the Broad Market fund
14 which was the (indiscernible).

15 MS. GRIFFIN: Your Honor, at the time that they
16 entered into the swap, they had already been willfully blind
17 since 2003. They had already exhibited that willful
18 blindness by being so concerned that they could be liable
19 for Madoff's acts as custodian -- they had so little faith
20 that he actually had custody of those assets they up and
21 moved. So what you have to look at is --

22 THE COURT: Of course they moved. The -- what was
23 it, Bermuda?

24 MS. GRIFFIN: Bahamas.

25 THE COURT: Bermuda had imposed -- well, the

1 Bahamas had --

2 MS. GRIFFIN: Yeah.

3 THE COURT: -- now imposed more rigorous
4 regulations, so they moved to another jurisdiction that had
5 less rigorous requirements.

6 MS. GRIFFIN: Your Honor, they did it in
7 deliberate reaction to Madoff. They were that concerned.
8 If you look at the emails that they're -- that we cite to in
9 our amended complaint, they are not doing this just as a
10 deliberate, hey, we want to get out generally --

11 THE COURT: Can I consider the allegations in your
12 earlier complaints?

13 MS. GRIFFIN: Yes, Your Honor. I mean --

14 THE COURT: No, I'm just asking.

15 MS. GRIFFIN: So, I mean on his --

16 THE COURT: Is it -- as a matter of a 12(b)(6)
17 motion, can I look at the allegations in your earlier
18 complaints? Because one of the arguments they say is, you
19 know, your earlier complaints did allege a lot of due
20 diligence by them.

21 MS. GRIFFIN: I am so glad you asked that, Your
22 Honor.

23 THE COURT: Okay.

24 MS. GRIFFIN: Because here, it's very clear --
25 Defendants made it very clear that there was no amount of

Page 28

1 due diligence that could ever satisfy them.

2 If you'll give me one second.

3 In September 2003, Brenda Buckley insisted that
4 without two separate streams of information that can be
5 provided that will allow independent reconciliation of the
6 trades, Fortis should not provide financing to its customer,
7 should change legal jurisdictions away from the Bahamas.

8 THE COURT: But isn't it more due -- updated due
9 diligence in 2006 or 2007?

10 MS. GRIFFIN: In July 2004, Fortis again confirms
11 that independent verification that Buckley wanted was not
12 possible. And here's the quote. Madoff's double role
13 implies there is no guarantee that the trades and positions
14 provided by Madoff to Fortis's administrator are objective,
15 and it is not possible to obtain independent confirmations
16 on trades and positions." Cadogan later said -- they
17 describe Madoff as a black box investment dilemma, a
18 phenomenon long-term record but meaningful access to
19 meaningful information was unviable.

20 Again in 2008, Cadogan and FMM decided to redeem
21 because of the unwillingness of the Madoff organization to
22 provide sufficient transparency.

23 THE COURT: Wasn't there some sort of due
24 diligence prior to the swap transaction?

25 MS. GRIFFIN: Yes, Your Honor, but they could

Page 29

1 never get -- according to these people in the complaint,
2 they could never get the independent verification which was
3 the very thing that triggered their concern.

4 THE COURT: But -- okay, but how can you say
5 they're willfully blind if they're suspicious?

6 MS. GRIFFIN: Right.

7 THE COURT: Which you're saying. And then they do
8 this due diligence.

9 MS. GRIFFIN: But, Your Honor, if you are
10 concerned that he doesn't have custody of assets, if you ask
11 him who your board of directors are and what's their title
12 and what's their training, that is never going to resolve
13 what the key issue is. There is check-the-box due
14 diligence, and there is what these people reported up their
15 line to their credit committees, to their central board that
16 concern them the most. And they could -- they said it was
17 impossible to ever get sufficient due diligence that would
18 satisfy them.

19 THE COURT: Okay, but they didn't turn a blind
20 eye. They found out what they could. They couldn't get
21 satisfactory answers, and then they were willing to invest
22 the money, but they --

23 MS. GRIFFIN: That is --

24 THE COURT: But they didn't turn a blind eye.

25 MS. GRIFFIN: Not getting confirmation of that

Page 30

1 which you say is essential, which Buckley said is essential
2 since 2003, is the act of turning a blind eye. Continue --
3 Judge Rakoff held this in Katz. Continuing to reap short-
4 term benefits while just looking away to -- and thinking
5 that you can minimize the risk by shifting jurisdictions and
6 not being liable or by -- you have these things in your --
7 in your swap transaction that you think might project you.

8 And by the way, Your Honor, they don't -- it's
9 about what these people thought at the time, and we cite in
10 our papers the fact that these institutions, after the 2008
11 financial crisis, there were -- there were articles written
12 and congressional testimony given that individuals at these
13 institutions have personal financial incentives that -- to
14 take on risky transactions that are contrary to the long-
15 term benefits of their institution. So --

16 THE COURT: I agree with you that maybe with
17 investment managers who don't have a lot of skin in the game
18 and get enormous fees, if that's the case, but this is a
19 lender, essentially, who -- let me finish -- who's loaning
20 \$470 million. What you're saying, they knew or should have
21 known -- well, I shouldn't say should have known -- but they
22 willfully blinded themselves to a Ponzi scheme, and, you
23 know, they -- even Judge Rakoff said nobody would -- nobody
24 would plausibly allege that they knowingly invested in a
25 Ponzi scheme.

1 MS. GRIFFIN: Right, and that's not what we have
2 to plead. But, Your Honor, the -- Judge Kimba Wood
3 explained it best in the Fischbach Securities case that we
4 had cited in our brief. She wrote there, facts suggesting
5 reckless disregard of the truth in a 10(b) (5) case often
6 suggest willful blindness. In most cases of reckless
7 disregard of the truth, defendants have had a motive for
8 deliberately remaining ignorant of the fact in question,
9 rendering their characterization as willfully blind more
10 plausible. The defendant is motivated not to open his eyes
11 to the underlying facts since this would place him in a
12 position of terminating his profitable financial situation
13 and exposing his associate or continuing to participate in
14 the fraudulent activities but now without his cherished
15 modicum of deniability.

16 Your Honor, with all due respect, I think you're
17 conflating motive and opportunity, which requires this huge
18 personal benefit as the scienter element when we are
19 pleading an alternative that is reckless disregard. That is
20 where you consciously turn away from something because you
21 have a profitable association. It's not \$100 billion. I
22 get -- I grant you this is not a feeder fund where they're
23 reaping all that, but it explains -- she says -- Judge Kimba
24 Wood says it explains why these non-neophytes in the
25 financial institution marketplace would turn a blind eye.

Page 32

1 That's why it doesn't have to be a bullet-proof protection
2 to a Ponzi scheme. It's just they thought they can continue
3 to do this while not getting the confirmation they said they
4 needed.

5 THE COURT: I had a different question which I was
6 going to ask both of you. Having read Judge Rakoff's 520 --
7 was it 546(g) decision.

8 MS. GRIFFIN: Sure.

9 THE COURT: Most of the discussion concerns
10 willful blindness under 550(b), but there's some confusion,
11 at least in my mind, whether there are two safe harbors or,
12 at least with respect to the collateral -- there's only one
13 safe harbor, five --you know, 546(g). It doesn't apply, and
14 I guess they could be liable for, under state law, for
15 constructive fraudulent transfer.

16 Or even if 546(g) doesn't apply, is it possible
17 that 546(e) applies to the same transfer.

18 MS. GRIFFIN: Your Honor, I think -- the first
19 thing I'll say is that I -- respectfully, I don't think you
20 have to answer that question here for our purposes.

21 THE COURT: Well, I'm curious.

22 MS. GRIFFIN: I know. I think in a nutshell that
23 in the 546(g) case, the judge there was focused on an
24 argument where the focus was on the defendants. And if you
25 look at the language of the decision, it was about did the

Page 33

1 subsequent transferee, was it made by or -- was the transfer
2 made by or to the benefit of the subsequent transferee. And
3 under those circumstances, he said that with respect to the
4 participants of a swap transaction, which is what Defendants
5 were, the mindset is irrelevant because that swap
6 transaction actually occurred.

7 THE COURT: But he was talking about the initial
8 transfer.

9 MS. GRIFFIN: He was talking about the -- right.
10 but if you look at the language of the --

11 THE COURT: So if the initial transfer from BLMIS
12 to, I guess, the Broad Market fund --

13 MS. GRIFFIN: Mh hmm.

14 THE COURT: -- is not safe harbored, the trustee
15 could recover that initial transfer or avoid that initial
16 transfer on a variety of theories. As I understand the
17 defendant's argument, that even if that transfer is not
18 safe-harbored under 546(g), it's safe-harbored under 546(e),
19 which just struck me as odd that you would have two safe
20 harbors.

21 MS. GRIFFIN: I think it's because Judge Rakoff
22 held that the mindset of the participants -- whether the
23 swap actually took place is irrelevant. I think that's what
24 the -- you asked the difference.

25 THE COURT: I'm asking a different question.

1 MS. GRIFFIN: Yeah. Okay.

2 THE COURT: Let's all agree that 546(g) does not
3 safe harbor the \$235 million swap because that's what Judge
4 Rakoff held.

5 MS. GRIFFIN: Could you repeat that, Your Honor?

6 THE COURT: Yeah. I'll read from his decision.

7 MS. GRIFFIN: Yes.

8 THE COURT: He's talking at the end. In sum, the
9 Court finds that both the initial transfer of the redemption
10 and collateral payments were made in connection with swap
11 transactions. Only the initial transfers of the redemption
12 payments and not the collateral payments were made, quote
13 "for the benefit of the defendants here," closed quote. So
14 he seems to be saying that the transfer from BLMIS to, I
15 guess it's itinually to the Prime Fund. I forget who the
16 initial transferee is, but let's just say Prime Fund.

17 MS. GRIFFIN: Right.

18 THE COURT: The initial transfer from Tremont --
19 to Tremont for the purpose of investing in a swap is not
20 safe-harbored under 520 --546(g). That's what he seems --
21 that's how I read this.

22 MS. GRIFFIN: The way we read it, Your Honor, is
23 that the redemption payments to Tremont were safe harbored.
24 The collateral was not under the second --

25 THE COURT: But you have to avoid the initial

1 transfer in order to recover the subsequent transfers.

2 MS. GRIFFIN: Correct.

3 THE COURT: And if you can avoid the initial
4 transfer relating to the \$235 million delivery of
5 collateral, the collateral transfer, on theories of state
6 law, preference, whatever it might be, it seems it's easier
7 for you at least to avoid that initial transfer as opposed
8 to the initial transfer which led to the redemption, which
9 presumably is safe-harbored under both 524(g) -- or is safe-
10 harbored under 524(g).

11 MS. GRIFFIN: I agree with you there, Your Honor,
12 because there was no -- there was no distinction made that
13 between the initial transfers that Tremont made on a daily
14 basis that were then directly tied, as Judge Rakoff pointed
15 out, to the redemptions that were made --

16 THE COURT: Let me ask the question different.

17 MS. GRIFFIN: Okay. Yeah. Okay.

18 THE COURT: If I conclude that the collateral
19 transfer is not safe-harbored under 524 -- I keep saying 524
20 --

21 MS. GRIFFIN: 546.

22 THE COURT: -- 546(g), do I then have to consider
23 whether that same transfer is safe-harbored under 546(e)?

24 MS. GRIFFIN: Your Honor, we believe the logic of
25 the 546(e) is the direct reason why the Defendant's argument

1 on this -- on the collateral provision doesn't apply. But

2 --

3 THE COURT: We're not getting anywhere.

4 MS. GRIFFIN: Okay.

5 THE COURT: All right. Why don't you -- why don't
6 you wrap it up?

7 MS. GRIFFIN: Okay, Your Honor. I guess for the
8 reasons that we've put forth in our papers, we believe that
9 the Trustee has pled willful blindness allegations
10 consistent with the standards set down in Katz and with the
11 other caselaw in the circuit on willful blindness.

12 THE COURT: Thank you.

13 Good morning.

14 MR. HARRIS: Thank you, Your Honor. Chris Harris
15 of Latham & Watkins for Defendants ABN AMRO. If it's all
16 right with your court, I'm going to address the 550(b) good
17 faith defense, and my colleague, Kevin Mallen will address any
18 questions you have on the no diminution of the estate and
19 also the issue we were just describing, which is 546(g) and
20 (e), and whether that means there's a double recovery that's
21 (indiscernible).

22 THE COURT: Well, not a double recovery, but if I
23 conclude that 546(g) doesn't apply, can 546(e) still apply
24 with the same initial transfer? That's my question.

25 MR. HARRIS: Understood. I'll just give a

1 preview. There is a difference that Judge Rakoff found in
2 his 546(g) decision.

3 THE COURT: Yeah.

4 MR. HARRIS: Which is that under 546(e), the state
5 of mind of the recipient of the initial transfer is
6 relevant, and under 546(g), it's not.

7 THE COURT: I understand the difference. I'm just
8 asking whether both apply or only one applies.

9 MR. HARRIS: They both apply, Your Honor.

10 THE COURT: Okay.

11 MR. HARRIS: I'll let my colleague explain why,
12 but it's basically because we made an argument today, we did
13 not make before your -- before Judge Rakoff, and he noted we
14 didn't make it. And we preserve the ability to make it now,
15 and they don't deny it.

16 THE COURT: Okay.

17 MR. HARRIS: Which is that Tremont itself
18 satisfies the definition of a financial participant, and it
19 was for the benefit of Tremont.

20 Let me tell you what I would like to address with
21 Your Honor. I was not planning on going into the standard
22 because I know that's before Your Honor on a number of
23 cases. I am happy to if you would like.

24 The one thing I did want to point out is this
25 issue that they are raising. Do you have to have knowledge

Page 38

1 of the Ponzi scheme fraud or some other fraud? Does it
2 matter here?

3 THE COURT: Well, the argument -- one of the
4 arguments Ms. Griffin has made is that you did whatever you
5 did. You suspected -- you were concerned about some of the
6 way that Madoff did business. You did what you did, but you
7 could never really satisfy yourself. It was impossible to
8 satisfy yourself because of Madoff's secretiveness and
9 whatever else that he really had custody of the assets with
10 him. And then you take the -- you receive the transfers,
11 the subsequent transfers anyway.

12 And I guess the argument is if you can never
13 really satisfy yourself, and you take the transfers, you've
14 turned a blind eye.

15 MR. HARRIS: Your Honor, that is just factually
16 untrue according to what they allege, which is that these
17 people who were involved in 2003 and '4 were then involved
18 in the relevant time period, 2007. We did diligence in the
19 interim. That diligence resulted in a diligence memo,
20 January 2017. And it is extremely clear --

21 THE COURT: 2017? 2007.

22 MR. HARRIS: I'm sorry, 2007. Thank you, Your
23 Honor. And it is very clear what we concluded, which is
24 that not only is his exposure what you would expect, not
25 only is his reputation excellent, but let me -- let me quote

1 to you the conclusion. This is --

2 THE COURT: This is (indiscernible).

3 MR. HARRIS: This is in the Gibson -- Giblin
4 declaration Exhibit C.

5 THE COURT: Okay.

6 MR. HARRIS: This is the conclusion on Page -- on
7 Page 5. Quote, "our review of the trades executed on behalf
8 of Harley through 2006 indicates that the trading mandate
9 has been implemented effectively and consistently." That is
10 the exact opposite of a belief that BLMIS hasn't been
11 implementing its trading mandate but instead is a Ponzi
12 scheme where no trades occur. It is impossible to both
13 think that he's effectively implementing his mandate and
14 that he is not doing any trades. So you know what the end
15 result here is after we do our diligence. We believed he
16 was implementing his trading mandate. That's the end
17 result.

18 You -- there are other documents from that sign --
19 same time period that also show that we believe BLMIS was
20 executing trades. They cite the internal resonance from
21 September 2007. That's the Giblin declaration Exhibit D,
22 and that says that we could reconstruct the portfolio two
23 days after trade tickets are received. They also cite the
24 November 2006 credit application. That's Giblin declaration
25 Exhibit E, and it said that Madoff provides copies of

1 individual trade tickets from each and every trade on the
2 brokerage account on a daily basis. It is very clear, to
3 cut to the end of the chase, that we believed Madoff was
4 executing his trading strategy. That's what we said. And
5 based on that, the relevant time period we then did the swap
6 agreement.

7 A couple other points I'd like to make on good
8 faith because they aren't in our briefing because they came
9 up in the reply. What you just heard in response to Your
10 Honor's question, why would we risk -- why would we invest
11 \$500 million? What you heard in response was fees. What
12 they don't tell you is what were those fees? Well, you can
13 look at the documents. The swap agreement, which is Giblin
14 Exhibit B, Page 6, tells you the fees, and they are
15 minuscule. It is 0.9 percent over LIBOR -- 0.9 percent over
16 LIBOR. That is half the fees in the BNP case. The spread
17 is half of the 1.7 percent over LIBOR in the BMP case Your
18 Honor already found was not a credible economic incentive.

19 So in other words, the Trustee's theory is that we
20 intentionally invested -- we'll use Your Honor's number --
21 \$500 million in a Ponzi scheme knowing it would have to fail
22 eventually on the chance of earning \$2 or \$3 million a year.
23 It is simply incredible.

24 Their only other response is, well, we were in bad
25 economic straits, and so we had an enhanced motive to make

Page 41

1 risky transactions. Well, it's one thing to do a gamble on
2 buying a lottery ticket where it's risky but there's a big
3 upside. That's not what they allege here. The situation
4 here is there is -- we're investing in a Ponzi scheme where
5 we know it's going to fall apart, and we have no chance of a
6 big upside. All we're going to get is a 0.9 percent fee if
7 we happen to get -- keep getting those fees before it
8 crashes. That is not just implausible but inconceivable
9 that any rational economic actor would do that.

10 Couple other points I'd like to make on good
11 faith, Your Honor. If you look back at the 2003 and 2004
12 documents that they cite, none of them mention a risk of
13 fraud, any fraud. And that's why -- sorry to say, Your
14 Honor, this dispute we -- you were having about does it have
15 to be some risk of fraud or Ponzi scheme in particular
16 doesn't matter in our situation because there is no document
17 cited throughout or any quote of a person --

18 THE COURT: Well --

19 MR. HARRIS: -- where anyone suspects that
20 (indiscernible) was engaging in fraud.

21 THE COURT: Well, there are -- there are documents
22 where they're questioning whether he was actually trading in
23 securities.

24 MR. HARRIS: Your Honor, I don't believe there
25 are.

1 THE COURT: That was my recollection.

2 MR. HARRIS: Counsel said that, but there's no
3 document that suggests he wasn't trading in securities.
4 And, in fact, if you look at the 2003 documents, they
5 suggest the opposite. If you look at Giblin Exhibit F, it
6 says that Harley, quote, "receives trade tickets, and the
7 portfolio is also independently priced with the exception of
8 the over-the-counter options," and it also says there is
9 subsequently a further reconciliation as the trade tickets
10 come in. Sounds like they think they're trading.

11 If you look at Giblin Exhibit G, it talks about
12 Harley's investment strategy. And it says Harley has
13 changed from investing 100 percent in treasury bills to
14 investing in 50 S&P stocks hedged by synthetic
15 (indiscernible) and that has, quote, "changed the risk
16 profile."

17 Clearly, the person writing this thinks that this
18 trading is happening, and that's why the risk profile has
19 changed.

20 And the other thing that's striking about these
21 documents is that they also -- the same people writing them
22 recommended that Fortis consider pitching to become the
23 custodian. Who pitches to become a custodian of a Ponzi
24 scheme or a fraudster or anything like that? No one. It's
25 not economically rational. That's why there is no document

1 that says we think he's not actually doing trades. It just
2 doesn't exist.

3 A couple other points I'd like to make on good
4 faith -- good faith. They mention a few third parties.
5 They mention MeesPierson, Cadogan, Fortis Multi-Management.
6 I don't have those documents because they're third parties,
7 and the Trustee declined to give them to me for this hearing
8 when I asked. But based on what they -- how they described
9 them in the complaint, we know that all of these entities
10 just had access to the same red flags that have been found
11 numerous times did not satisfy willful blindness.

12 So if you look at the complaint, the way they
13 structure it is Paragraph 159 talks about the Cadogan
14 concerns, A, B, C, D, all these different red flags. And
15 then Paragraph 160 says, quote, "Cadogan's list looks
16 substantially the same as the Mees memo. Fortis employees'
17 concerns articulated in connection with Harley, and Fortis
18 Multi-Management's observations and questions." So we know
19 whatever those documents are, it's all the same thing you
20 can find in 159. And nothing in that list is a belief that
21 there's a Ponzi scheme. Nothing in that list says he's not
22 actually trading. So these are just the same red flags that
23 already covered in BNP, for example.

24 The other thing I'd say about all this, these
25 third parties, is what they allege is that these concerns

1 filtered up to FMM, which is on the other side of the
2 business from the defendants here.

3 THE COURT: Can I decide what -- what you're
4 really talking about is imputation. Can I decide that on
5 motion to dismiss?

6 MR. HARRIS: There certainly are cases that we
7 cite where it is decided on a motion to dismiss. But I --
8 even before you get to imputation, there's another point I
9 wanted to make, which is if you look at what FMM -- so these
10 all bubble up to FMM. Great. I don't know what those
11 documents say, but I do know how FMM took them. And that's
12 because if you look at Paragraph 156, it tells us. It says
13 that FMM stopped investing in Rye because of, quote,
14 "concerns with counterparty risk," and they explain that
15 means concerns that (indiscernible) counterparties like
16 Goldman would go bankrupt, "cost of leverage, liquidity."
17 You can also look at Paragraph 141 where they again explain
18 what counterparty risk means. It means that BLMIS was so
19 big it was exposed to risk if its counterparties like Lehman
20 failed.

21 So that's what FMM was concerned about and why it
22 stopped doing business. It was concerned about counterparty
23 risk, cost of leverage, liquidity. So whatever percolated
24 up to FMM, it's not a concern that BLMIS was a Ponzi scheme
25 or there wasn't engaging in trades. It was other reasons.

1 On imputation, to answer your question, yes.

2 There certainly are lots of cases that we cite and where you
3 -- Courts have decided there's no agency as a matter of law
4 on a motion to dismiss based on the allegations. Here, the
5 only thing that they allege that ties us is they allege --
6 well, first they say that we are part of the same global
7 risk management evaluation. And therefore, the inference is
8 that they must share their concerns with us. That is just
9 like in BNP where Your Honor held that complaint does not
10 allege facts supporting the inference that the knowledge
11 garnered on one side was shared with the other.

12 And, in fact, the actual facts here show that it
13 wasn't because if you look at our documents, the credit memo
14 from November, the January -- November 2006, the January
15 diligence, none of them mention FMM. None of them mention
16 any concerns from them. And, in fact, the credit memo --
17 that's Giblin Exhibit E -- talks about Tremont being a new
18 relationship. That's on Page 2 of it.

19 So it's not only that there's no facts alleged,
20 but what they do allege suggests that there was no sharing
21 of concerns.

22 THE COURT: Can I consider all of these documents
23 in connection with the motion to dismiss? I assume I can
24 consider the swap because that's the underlying -- that's
25 one of the underlying claims, the principle claims. But,

1 for instance, you've attached as Exhibit a Fortis's annual
2 review for 2005. I don't recall them relying on that.

3 MR. HARRIS: Your Honor, all the documents we
4 attached were cited in their complaint.

5 THE COURT: In the original complaint?

6 MR. HARRIS: Some were in the original. Some were
7 in the amended.

8 THE COURT: All right. I'll --

9 MR. HARRIS: And they, you know, agreed that we
10 can -- they're fair game. So, yes. They are -- they all
11 can be considered.

12 Just a couple other points I wanted to make on
13 good faith, Your Honor. The -- really the last point I
14 wanted to make on it is the standard here, whether it's
15 knowledge of the Ponzi scheme or knowledge of some other
16 fraud, it's not a suspicion. It is high probability.

17 THE COURT: High probability. I use suspicion as
18 a shorthand.

19 MR. HARRIS: Well, the Global-Tech case tells us
20 what that means. It means, quote, "you can almost be said
21 to have actually known the critical facts." Almost actually
22 known. And then the Supreme Court tells us that's more than
23 recklessness, which is a substantial and unjustified risk.
24 And they -- it then tells us certainly more than negligence,
25 which is just that you should've known. Okay.

1 What is it -- taking everything they -- all the
2 inferences they drew -- draw as true, what do they allege?
3 They allege negligence. They say that -- this is on Page 2
4 of their reply brief. They say the same thing on Page 5.
5 Fortis acquires subjective belief Madoff might not be
6 trading and could be misappropriating customers' assets.
7 That is negligence. And counsel just said the same thing
8 today. She said they believe that -- we had a belief that
9 they might not be trading and didn't have custody of the
10 assets. Nowhere is there even an assertion that we had a
11 high probability that we could almost be said to have
12 actually known that there was -- whether it's the Ponzi
13 scheme fraud or some other fraud.

14 Second point I'd like to turn to is the diligence,
15 turning a blind eye. So, as Your Honor noted, and they
16 don't dispute, we did extensive diligence both in 2003 and
17 2004. And then we did more in 2006 and 2007. 2006, we met
18 with Madoff, or with BLMIS, asked our questions, got
19 answers. We also got trade tickets and reconciled and
20 confirmed, and then we did further diligence on Tremont
21 itself, and we did diligence on its controls and its ability
22 to manage the Madoff relationship. We did all of that
23 diligence in -- up -- leading up to the 2007 decision. So
24 it's simply not true to suggest we turned a blind eye. We
25 did the exact opposite of that.

1 In terms of the two things that they do point to,
2 to suggest are turning a blind eye, which is the transfer of
3 administration of Harley from Bahamas to Cayman and then the
4 deal protection devices, they are confusing or conflating
5 avoiding risk with avoiding knowledge. Neither of those two
6 things have anything to do with avoiding knowledge. So if
7 you look at the transfer back in 2003, they say it was
8 triggered by these new Bahamas statutes. But as we explained,
9 and they don't deny, those statutes had nothing to do with
10 obtaining knowledge. There was no duty to investigate or
11 verify the trades were being executed in the new statute.
12 It didn't impose any duty to verify the conduct. And, in
13 fact, it decreased the deputy in some instances.

14 We pointed that out, and they don't -- they don't
15 deny that. What they say is, well, that doesn't matter. It
16 doesn't matter what the statute actually says. What matters
17 is what do the people think? Okay. Well, then look at the
18 documents that they cite. The Giblin declaration Exhibit F,
19 that is the documents where they say talks about what our
20 concerns were, and those concerns were about liability.
21 Nothing about them says anything about a duty to investigate
22 BLMIS.

23 So the transfer didn't result in and wasn't
24 triggered by any desire to avoid learning. It was a desire
25 to minima our economic risk, which is not surprising.

1 The other thing they point to is the deal
2 mechanism in the swap transaction. Again, none of those are
3 about avoiding knowledge. They are about avoiding our
4 economic risk. They are not unusual. As Your Honor has
5 pointed out, they are normal indemnification techniques.

6 The other thing we got was a most-favored nation
7 clause, which again is not usual. That happened to then
8 drag along specific fraud-related items that a different
9 party, RBS, had negotiated, but we didn't request them.
10 And, in fact, we did the original swap transaction without
11 having them. So those are not evidence at all that we are
12 turning a blind eye or even were aware there was fraud.

13 The other thing I would like to turn to now, just
14 quickly, is value because we argue that we provided value.
15 That's the other prong. There were two sets of transfers
16 here. One was related to collateral, and they don't deny
17 that we provided value in exchange for collateral. And it's
18 not surprising because we gave -- we gave exactly what
19 Tremont wanted, which was we gave them this enormous
20 leverage return. They do challenge that we provide value on
21 the second thing, which is the \$30 million redemption, which
22 Judge Rakoff already found was triggered by Tremont reducing
23 the size of the swap.

24 Well, we did provide -- and we provided value in
25 two ways. We gave up a stock, and that has two different

1 forms of value. One is the stock itself has value. Now,
2 they say, well, it's a bankrupt entity. Therefore, it has
3 no value. That's just not true. Companies in bankruptcy,
4 their stock has value because it has option value. You
5 never know what's going to happen. and that's why there's
6 several cases, and Your Honor cited them in BNP, explaining
7 specific to the 550(b) context by giving up stock in a
8 bankrupt company, you can add value.

9 The second kind of value is by giving up the
10 stock, we gave up the litigation claims against Tremont and
11 Rye that are associated with that. And that's a second form
12 of value. It's similar to this --

13 THE COURT: I understand (indiscernible) anything
14 like that.

15 MR. HARRIS: Well, Your Honor, I'll -- let me
16 explain what happened on those because actually --

17 THE COURT: It's not in the complaint.

18 MR. HARRIS: Well, it is. Both of these are
19 conceded in the complaint. Let me -- let me show you where.

20 THE COURT: I know the complaint refers to them as
21 redemption, as a redemption.

22 MR. HARRIS: That's right. They concede they're
23 redemptions, but they also concede the two value points I
24 just made. So let me -- let me tell you where. The first
25 is that they admit that the Broad Market shares ended up

1 having value. Where did they admit that? Well, they admit
2 that in the Tremont settlement, the Trustee gave Broad a
3 \$1.6 billion claim plus its share of a \$800 million
4 (indiscernible) claim.

5 So we know -- no surprise -- that Broad in fact
6 has a lot of -- is going to have a lot of assets, and those
7 shares will have value that will flow from Broad. That's
8 the first prong. Just like many bankrupt entities, there
9 may still be value for the shareholders, and they admit
10 that. One place you can look at that is Reply Brief Page
11 29. They concede that this settlement occurred, and they
12 granted billions of dollars of claims to Broad, the entity
13 whose shares we gave up.

14 The second thing they also concede is these
15 litigation claims. So --

16 THE COURT: Where's that in the reply brief?

17 MR. HARRIS: That's in Paragraph 217. Because
18 what happened, which they concede is that there was a
19 settlement between the Rye shareholders and Tremont of
20 litigation claims, and these resulted in hundreds of
21 millions of dollars being paid by Tremont, and they
22 calculate our share of that would've been several hundred
23 million dollars.

24 So there's two different forms of value, and
25 they're both conceded in the complaint. Broad itself will

1 have money to distribute, and we got money from Tremont, and
2 so we gave up the portion of it that was associated with the
3 \$30 million claims.

4 The last point I'd make on --

5 THE COURT: I don't understand that. You got
6 dollar for dollar for your \$30 million of investment.
7 You're not getting dollar for dollar for the money you left
8 in the fund.

9 MR. HARRIS: Well, what they're sign is our shares
10 were worthless, right. 550(b) doesn't ask whether you gave
11 reasonably (indiscernible) value. It says did you give any
12 value, value (indiscernible).

13 THE COURT: Right.

14 MR. HARRIS: They're sign the shares we gave up
15 were worth zero. And I'm saying no. If I'd kept them, I
16 would've gotten money from Broad.

17 THE COURT: Right.

18 MR. HARRIS: And I would've gotten money from
19 Tremont. And there's evidence in the complaint that
20 supports both of those.

21 If Your Honor has any other questions -- if not,
22 I'll let my colleague speak about the other defense.

23 THE COURT: Sure.

24 MR. MALLEN: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. MALLEN: Kevin Mallen with Latham & Watkins
2 for the ABN AMRO defendants, and I'd like to speak a little
3 bit first about the 546(g) defense and then a little bit on
4 depletion of the estate defense.

5 THE COURT: Okay.

6 MR. MALLEN: So on 546(g), we just would like to
7 make the point that we do still advance our argument that
8 the 235.5 million collateral is covered by Section 546(g).

9 And --

10 THE COURT: I thought Judge Rakoff said it wasn't.

11 MR. MALLEN: Well, Judge Rakoff said it wasn't
12 because we had advanced in our prior briefing only that
13 Fortis -- that it was the swap transaction or -- excuse me,
14 that the initial transfer was for the benefit of Fortis, but
15 we hadn't advanced the arguments that we now advance in our
16 current papers, which is that there are two other entities
17 that can satisfy the (indiscernible) entity requirement of
18 Section 546(g), one of them being Rye XL. And the initial
19 transfer of the benefit of Rye XL because it allowed Rye XL
20 to obtain the leverage investment (indiscernible), and
21 that's something that Judge Rakoff recognized in the 546(g)
22 decision. And then Rye XL is also a financial participant
23 because by entering into the over \$700 million swap
24 transaction, it satisfied Section 546 -- or, excuse me, the
25 requirement for a financial participant to have a gross

1 (indiscernible) market position of at least \$100 million
2 within 15 months of petition date.

3 We also put forward that (indiscernible) would
4 also be a financial participant for the purposes of 546(g)
5 with the initial transfer and (indiscernible) Tremont
6 complaint, which was --

7 THE COURT: But didn't Judge Rakoff say that it
8 was for the benefit of Tremont, and Tremont was not a -- or
9 implicitly was not a financial participant?

10 MR. MALLEN: But we didn't --

11 THE COURT: Why --

12 MR. MALLEN: I don't believe we advanced that
13 argument in our papers at the time.

14 THE COURT: Why not?

15 MR. MALLEN: I don't believe it was addressed in
16 the (indiscernible).

17 THE COURT: Was the argument limited to the
18 applicability of 524 -- 546(g)?

19 MR. MALLEN: Excuse me, Your Honor?

20 THE COURT: Was the argument or the issue before
21 Judge Rakoff -- because he withdrew the reference on a lot of
22 the issues --

23 MR. MALLEN: Sure.

24 THE COURT: -- if you look at the order, including
25 546(e), obviously. Was the argument limited to the

1 applicability of 546(g) before Judge Rakoff that triggered
2 this decision?

3 MR. MALLEN: My understanding is that it was, Your
4 Honor.

5 THE COURT: All right. Is that -- is that the
6 Trustee's understand?

7 MS. GRIFFIN: I don't -- I don't know in which way
8 you think it's limited. I think the issue of 546(g) -- I
9 mean, you advanced an argument pursuant to --

10 THE COURT: Did they -- well, the question -- did
11 they make an argument in that case that even if 546(g)
12 didn't apply, 546(e) did or something like that?

13 MS. GRIFFIN: I don't --

14 THE COURT: Okay.

15 MR. MALLEN: We certainly advanced argument in
16 this case that 546(e) applies if 546(g) does not.

17 THE COURT: Well, I don't know what the answer is,
18 but there seems to be some sort of agreement that both
19 apply. So, I guess it doesn't matter.

20 MR. MALLEN: Right. And so, Your Honor, I would
21 point out that in the Trustee's reply brief, he does not
22 speak that the transfers in this case are covered by 546(g).
23 It doesn't -- the reply doesn't address at all whether or
24 not the 245.5 million collateral --

25 THE COURT: But you got all your transfers within

1 two years. What difference does it make? It still comes
2 down to willful blindness. I know there's an argument that
3 maybe they didn't plead that Tremont had actual knowledge,
4 but -- which they would have to plead if one of the safe
5 harbors applied.

6 MR. MALLEN: Well, Your Honor, I understand Judge
7 Rakoff's decision in the 546(g) (indiscernible) that's not
8 the case that the actual knowledge exception to the safe
9 harbor only applies to Section 546(e), but not Section
10 546(g).

11 THE COURT: I know that, but -- that's why I kept
12 asking the question. I guess I haven't -- maybe I didn't
13 get an answer whether both applied.

14 MR. MALLEN: Well --

15 THE COURT: And if 546(g) doesn't protect the
16 transfer relating to the collateral transfer, 546(e) does.
17 Then they both apply.

18 MR. MALLEN: Your Honor, we would say that they
19 both apply. And I think from -- in our view -- perhaps
20 Section 546(g), if all the other requirements are meant, is
21 easier because we don't have to argue whether Tremont knew
22 that -- with respect to Madoff's fraud.

23 THE COURT: Okay.

24 MR. MALLEN: And so if we (indiscernible) that
25 understanding, there's not really any dispute that these

Page 57

1 transfers are covered by Section 546(g) between the parties,
2 and if that's the case, then with respect to all the
3 transfers here, the claimants would be limited to actual
4 file and transfer within two years (indiscernible).

5 THE COURT: Okay, but all the transfers were made
6 within two years.

7 MR. MALLEN: Right.

8 THE COURT: The initial transfers. That's my
9 understanding.

10 MR. MALLEN: Your Honor, I'm not sure it's clear
11 on the (indiscernible).

12 THE COURT: Oh, I thought -- I thought I saw that
13 --

14 MR. MALLEN: The subsequent transfers certainly
15 were all made within two years.

16 THE COURT: Yeah. Okay. Fair enough.

17 MR. MALLEN: I confess I'm not as familiar with
18 the initial transfers on the long sheet (indiscernible).

19 And so on this -- if I may, I'd like to move to
20 the depletion of the estate argument.

21 THE COURT: Sure.

22 MR. MALLEN: So independently, the Trustee can't
23 recover these transfers because they were circular transfers
24 that do not deplete the estate. And importantly --

25 THE COURT: What do you mean circular transfers?

1 MR. MALLEN: So the transfer started at Madoff
2 Securities.

3 THE COURT: Right.

4 MR. MALLEN: And it went around the horn to
5 Tremont, withdrew some money from Prime Fund with a goal of
6 shooting it to Rye XL so it could make its leveraging
7 investment in my client. Then my client tripled it, went
8 back to Broad Market, and it went back to Madoff Securities.

9 THE COURT: Where's the allegation that it was
10 reinvested in Madoff Securities, and who got -- and who got
11 the credit for that investment? The Trustee has already
12 paid a settlement based on that investment.

13 MR. MALLEN: So, Your Honor, in terms of that it
14 was invested in Madoff -- sorry. You're asking what that
15 Broad -- (indiscernible).

16 THE COURT: Well, your assumption is -- putting
17 aside the legal effect -- that the money, I guess, that
18 Fortis invested with -- I'll just say Tremont, which then
19 reinvested --

20 MR. MALLEN: Into --

21 THE COURT: Okay. And where's the allegation of
22 that complaint?

23 MR. MALLEN: Well, Your Honor, in --

24 THE COURT: How do we know it wasn't used to pay
25 other redemptions?

1 MR. MALLEN: So specifically, in the original
2 complaint at Paragraph 119 -- you may remember this chart,
3 which many defendants in these cases have referenced -- the
4 Trustee created this chart which showed that in May 2008,
5 Prime Fund withdrew 475 million to impart -- provide the
6 defendants 125 million to upsize the swap transaction.

7 THE COURT: But okay. Let's assume you're right.

8 MR. MALLEN: Sure.

9 THE COURT: But then when the Trustee settles with
10 Prime Fund -- with Tremont, it's based on Tremont's net
11 equity claim, and Tremont is getting credit for its net
12 equity claim based on any investment that Tremont made in
13 BLMIS. And then Trustee is paying out on that, so how is
14 that not a depletion of the estate? If you had never
15 returned the money, the Trustee wouldn't be paying out that
16 money to Tremont.

17 MR. MALLEN: Well, Your Honor, I think we're --
18 there -- we have -- there are two responses to this. One is
19 looking at that this is a single integrated transaction and
20 looking at the cases like Adelphia. They state that if
21 you're looking at this integrated transaction at the times
22 of -- time of the -- this circular transfer, those transfers
23 aren't filing conveyances if at that time the money -- or
24 they say it was not depleted at that time because the money
25 went around the horn and went back to the Debtor.

1 And then the second point to be made is just that
2 we point out that Broad Market had a 1.6 billion customer
3 claim, was a big-time net loser. They paid 1 billion back
4 into the estate but only received an 800 million claim, so
5 we think there's an inconsistent there were certain
6 subsequent transferees may have provided additional value
7 back to the estate, and so there may not have been
8 depletion.

9 THE COURT: Okay.

10 MR. MALLEN: No further questions.

11 THE COURT: No. Ms. Griffin, what is your response
12 to this depletion argument?

13 MS. GRIFFIN: I guess I'm confused, Your Honor.
14 It's -- the cases that talk about the round tripping, it's
15 usually where the debtor takes the money out and gives it to
16 somebody else who then passes it back in. And what we're
17 talking about here is a situation where Tremont has on a
18 rolling basis has Fortis redeeming. It has other people
19 coming in. It replaces Citibank. You know, it's -- this
20 defendant is not -- is not round-tripping anything with the
21 debtor. It's taking its money out, and it's keeping it.
22 And the other defendants are doing the same. So the fact
23 that other people come in, that's what the Ponzi is.

24 THE COURT: Well, maybe the answer is that the
25 money that they invested is not the money that was taken

1 out.

2 MS. GRIFFIN: Correct. That's what the Ponzi
3 scheme is, Your Honor.

4 You know, I guess -- very quickly. I'm not going
5 to feed the dead horse on everything we've talked about
6 before, Your Honor, but all of the things that Mr. Harris
7 pointed to about they did due diligence, they reviewed the
8 trade tickets, reconstructed trade tickets, all of these did
9 not give the independent trade information that Buckley
10 wanted in 2003. She wanted two independent streams to
11 verify.

12 All shoestrings about the excellent track record
13 of Madoff, Cadogan -- again, FMM's partner -- said at the
14 time, yeah, they had a great track record, but you couldn't
15 get any meaningful information. So none of that diligence
16 works.

17 The fact that the Defendants didn't use the risk
18 of fraud language in their documents, if you look at the
19 Optimal decision, Your Honor, questions going to the
20 existence of the -- of the assets, whether or not there is
21 trades -- and, by the way, Buckley actually is the person.
22 Not all the documents that we cited to were actually
23 included by Defendants when we submitted them, and we
24 certainly -- I don't make it a practice to attach a ton of
25 things, but if you look at --

1 THE COURT: I'll consider what you want me to
2 consider --

3 MS. GRIFFIN: Sure.

4 THE COURT: -- as long as it's --

5 MS. GRIFFIN: Sure, Your Honor.

6 THE COURT: -- you know, can be considered. But I
7 can't go looking through --

8 MS. GRIFFIN: No, no. I --

9 THE COURT: -- records hoping to find some gold
10 for you.

11 MS. GRIFFIN: Okay. If you look at Paragraph 1 --
12 oh -- 114.

13 THE COURT: Of the complaint?

14 MS. GRIFFIN: Yes.

15 THE COURT: Let me just get there.

16 MS. GRIFFIN: There's an email string in September
17 1, 2003. And Your Honor thought that there were some
18 documents that say that they thought there was the
19 possibility of no securities trading. This is the exact
20 paragraph I was talking about.

21 THE COURT: Mh hmm.

22 MS. GRIFFIN: I am still extremely uncomfortable
23 with giving financing to so-and-so and now possibly redacted
24 given their investment in Harley and the broker-dealer with
25 Madoff. Before that option can be considered, we'll need

1 some assurance in how the front and back office are
2 separated. And if two separate streams of trade information
3 can be provided, that will allow independent reconciliation
4 of trades in Harley. Without this, I do not support
5 financing.

6 THE COURT: Well, yeah, but that's a risk
7 analysis. It's not -- it's not saying we don't think he's
8 trading securities. It's just saying you can't confirm what
9 he's doing.

10 MS. GRIFFIN: Your Honor --

11 THE COURT: And I understand they might not want
12 to invest on that -- or participate on that basis.

13 MS. GRIFFIN: They --

14 THE COURT: But that's a far cry from saying I
15 think there's a high probability that he's not trading
16 securities or engaged in any other fraud.

17 MS. GRIFFIN: On this basis, they suggested that
18 they should -- that they should get their client to try to
19 get another custodian appointed, that they -- that they
20 should cease providing administrator services. One -- Roger
21 Hanson said if we cannot get the jurisdiction changed, we
22 have no choice but to resign. We have no choice to resign
23 as the administrator. Fortis Multi-Management is reported
24 as being nervous, apprehensive. These words are words that
25 don't say, hey, we're worried that the pricing might be

1 wrong. These are serious actions and reactions to a real
2 concern that they articulate -- Sue Novo. If you go through
3 our complaint again, they are asking questions. Does he
4 have custody of the assets? Do we have information that can
5 verify trading is happening? And the Optimal case says that
6 goes to the heart of the existence of the Ponzi scheme here.
7 That is Judge Scheindlin, and I think she's citing to the
8 (indiscernible) case as well.

9 So, Your Honor, with regard to one other question
10 with respect to whether the Bahamas law eliminated a duty,
11 Your Honor, I'm going to start with this is all a misdirect.
12 They litigate by hindsight here trying to create issues of
13 fact as opposed to looking at what the people at the time
14 thought was going on.

15 If you look at our allegations, it's the act, not
16 the regulations Defendants attach in there at declaration.
17 I can point you to the Bahamas's act if you want to. We can
18 get into a whole legal debate about what the scope of the
19 act was and what it was. But in the act, which we pulled up
20 again. Because I thought it was irrelevant, I didn't deal
21 with it on reply. But the act made it clear that in 2003,
22 the administrator -- it's not attached, Your Honor. The
23 regs are attached to --

24 THE COURT: Mh hmm.

25 MS. GRIFFIN: -- that declaration. I'll be happy

1 to submit the two sets of acts subsequently.

2 Again, Your Honor, this is a misdirect, and it's
3 not really relevant, but I want you to understand the act in
4 the 2003 made the administrator have to verify that the
5 licensing requirements continued to be met. And those
6 licensing requirements now require that the fund verify its
7 custodians and its investment manager were fit improper.
8 And it was that -- that act is what prompted Sue Novo to say
9 -- this is her words. We don't have to have a lawyer
10 debate. What we think in 2019 doesn't matter. She says in
11 Paragraph 105, all in all, if these funds still fall under
12 Bahamas Securities Commission for the present, then
13 irrespective of anything else, we need to be very careful in
14 that the responsibilities of the administrator are
15 (indiscernible) with someone of an overall responsibility
16 for the fund, responsibility to investors -- and I'll skip
17 to the end -- and I believe in the latest legislation
18 responsibility for the custodian. Be very careful I believe
19 the legislation makes us responsible for Madoff.

20 That is evidence of how high probability of --
21 that they're not engaging in trades, Your Honor, that they
22 don't have custody --

23 THE COURT: Why doesn't it mean they just can't
24 confirm the information?

25 MS. GRIFFIN: That's not an option under the act.

1 THE COURT: Well, I don't know. I --

2 MS. GRIFFIN: They -- that's what she thinks.

3 THE COURT: I don't know what the act says. I
4 don't have any affidavits from experts on what the act says,
5 but you're telling me that it doesn't matter what the act
6 says, that I have to look at the concerns --

7 MS. GRIFFIN: That it's --

8 THE COURT: -- of the people. And, you know, when
9 I read this, I get it. They couldn't confirm that he was
10 the custodian. They couldn't confirm some other things, but
11 that doesn't mean that they think he's not trading -- that
12 there's a high probability that he's not trading securities.
13 And even as counsel pointed out in your reply memo -- I'll
14 just get the language -- you're saying Fortis had a
15 subjective belief that Madoff might not be engaged in trades
16 and could be misappropriating customer assets. That doesn't
17 sound like a high probability.

18 MS. GRIFFIN: Your Honor, it gets repetitive when
19 you write a brief, but when you look at Paragraph 11 --

20 THE COURT: That's what I'm reading.

21 MS. GRIFFIN: No, I know. But if you look at
22 Paragraph 11 of our complaint, this highly affirmative
23 action by Fortis not only demonstrates the high degree of
24 probably of fraud at BLMIS that they saw and that
25 demonstrates their willful blindness. We have highly -- I

1 can go through and highlight the number of times we say that
2 there is a high probability of fraud and that he's not
3 trading or not custodian.

4 It -- the fact that I was loose on language in a
5 reply is definitely not what you should look at. You should
6 look at the well-pleaded facts of our complaint.

7 THE COURT: All right.

8 MS. GRIFFIN: And I think, Your Honor, with that,
9 unless you have any further questions --

10 THE COURT: No. I'll reserve decision. Thank you
11 very much.

12 MS. GRIFFIN: Thank you.

13 (Whereupon these proceedings were concluded at
14 11:16 AM)

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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

5

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Ledanski Hyde

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[& - addressed]

Page 1

&	160 43:15	27 68:25	700 53:23
& 4:13 5:11,21	1667 6:20	29 51:11	703 15:3
6:4,10 36:15 53:1	17th 8:20	3	77002 7:4
0	1960s 15:25	3 11:7 40:22	8
0.9 40:15,15 41:6	2 40:22 45:18 47:3	30 49:21 52:3,6	800 51:3 60:4
01701 4:14	20006 6:21	300 68:22	811 7:3
08-01789 1:3	2001 15:22 16:1	330 68:21	885 6:13
09-01239 4:13	17:21,22	4	a
1	2003 26:17 28:3	4 38:17	ability 37:14
1 60:3 62:11,17	30:2 38:17 41:11	425 5:12	47:21
1.6 51:3 60:2	42:4 47:16 48:7	45 5:5	abn 1:18,20 4:1
1.7 40:17	61:10 62:17 64:21	470 30:20	6:11 20:2 36:15
10 12:24 31:5	65:4	475 59:5	53:2
10-03800 3:2 4:11	2004 28:10 41:11	5	absolutely 24:13
10-04377 2:12 4:5	47:17	5 31:5 39:7 47:4	24:17
10-04658 2:2 4:8	2005 46:2	50 42:14	access 28:18
10-05355 1:9,14	2006 28:9 39:8,24	500 5:23 24:23,25	43:10
4:1	45:14 47:17,17	40:11,21	accompanied 14:2
100 31:21 42:13	2007 28:9 38:18	520 32:6 34:20	17:1
54:1	38:21,22 39:21	524 35:9,10,19,19	account 14:13,15
1000 6:20	47:17,23	54:18	14:18 15:3,6,14
10004 3:15	2008 28:20 30:10	53rd 6:12	15:16 17:23 40:2
10017 5:13	59:4	546 20:23,24 32:7	accounting 9:2
10019 6:6	2009 13:22,25	32:13,16,17,23	accounts 18:18,21
10022 6:14	2010 18:6	33:18,18 34:2,20	accurate 68:4
10110 5:24	2012 12:10,11,15	35:21,22,23,25	acquires 47:5
10111 5:6	13:17,20	36:19,23,23 37:2	act 23:15 24:4
105 65:11	2015 14:5,10	37:4,6 53:3,6,8,18	30:2 64:15,17,19
10:19 3:18	2017 12:7,13,16	53:21,24 54:4,18	64:19,21 65:3,8
11 66:19,22	12:18 13:2 38:20	54:25 55:1,8,11	65:25 66:3,4,5
1100 7:3	38:21	55:12,16,16,22	action 66:23
114 62:12	2019 3:17 65:10	56:7,9,10,15,16	actions 64:1
11501 68:23	68:25	56:20 57:1	activities 31:14
119 59:2	217 51:17	550 32:10 36:16	actor 41:9
11:16 67:14	230 26:12	50:7 52:10	acts 26:19 65:1
12 4:13 27:16	235 34:3 35:4	55th 6:5	actual 21:6 45:12
125 59:6	235.5 53:8	6	56:3,8 57:3
141 44:17	245.5 55:24	6 27:16 40:14	add 50:8
15 54:2	25 3:17	7	additional 60:6
156 44:12	250 6:5	7 14:23	address 36:16,17
159 43:13,20	26th 10:14,16		37:20 55:23

[adelphia - basically]

Page 2

adelphia 59:20	45:20 47:2,3	argument 13:14	attorneys 5:4 7:2
adjourn 10:15	alleged 22:23	13:17 17:9,22,24	available 14:8
administration	45:19	19:15 20:15 32:24	avellino 11:8
48:3	alleging 17:16	33:17 35:25 37:12	17:19,20
administrator	allow 28:5 63:3	38:3,12 53:7	avenue 5:12,23
28:14 63:20,23	allowed 53:19	54:13,17,20,25	6:13
64:22 65:4,14	alternative 31:19	55:9,11,15 56:2	avoid 33:15 34:25
admit 18:24 50:25	amend 4:3 20:12	57:20 60:12	35:3,7 48:24
51:1,1,9	amended 27:9	arguments 27:18	avoiding 48:5,5,6
admitted 18:23	46:7	38:4 53:15	49:3,3
adv 1:9,14 2:2,12	amount 27:25	article 11:7	aware 13:1 49:12
3:2 4:1,5,8,11,13	amro 1:18,20 4:1	articles 30:11	b
advance 53:7,15	20:2 36:15 53:2	articulate 64:2	b 3:21 7:7 27:16
advanced 53:12	analysis 63:7	articulated 21:4	31:5 32:10 36:16
53:15 54:12 55:9	annexed 12:13	43:17	40:14 43:14 50:7
55:15	annual 46:1	aside 58:17	52:10
advisory 16:9,11	answer 9:20 11:11	asked 15:24 27:21	back 9:11 17:7
16:20 17:5	16:3 22:19 32:20	33:24 43:8 47:18	41:11 48:7 58:8,8
affidavit 13:4,8	45:1 55:17 56:13	asking 22:1,13	59:25 60:3,7,16
13:18 14:1	60:24	24:8 27:14 33:25	63:1
affidavits 14:3	answers 29:21	37:8 56:12 58:14	bad 40:24
66:4	47:19	64:3	bahamas 26:24
affiliates 14:25	anyway 38:11	assertion 47:10	27:1 28:7 48:3,8
affirmative 66:22	apart 41:5	assets 22:22 23:2	64:10 65:12
agency 45:3	appear 19:1 21:7	23:7 26:20 29:10	bahamas's 64:17
ago 12:25	appearing 7:9	38:9 47:6,10 51:6	bakerhostetler
agree 19:18 21:5	applicability	61:20 64:4 66:16	5:3 7:1
21:11,15 30:16	54:18 55:1	associate 31:13	bank 1:18,19 4:2
34:2 35:11	application 39:24	associated 50:11	15:14,16 17:22
agreed 19:8,13,13	applied 56:5,13	52:2	banking 15:2
46:9	applies 4:13 32:17	association 31:21	bankrupt 44:16
agreement 14:22	37:8 55:16 56:9	assume 13:22,25	50:2,8 51:8
17:2,3 40:6,13	apply 32:13,16	45:23 59:7	bankruptcy 1:1
55:18	36:1,23,23 37:8,9	assuming 11:11	3:13,23 50:3
ahead 20:2 25:24	55:12,19 56:17,19	assumption 58:16	barlett 5:11
al 4:5	appointed 63:19	assurance 63:1	based 11:8,25
allegation 58:9,21	appointment	attach 61:24	13:13 16:20 18:6
allegations 20:13	13:23	64:16	18:19,22 24:19
22:23 27:11,17	apprehensive	attached 46:1,4	40:5 43:8 45:4
36:9 45:4 64:15	63:24	64:22,23	58:12 59:10,12
allege 22:20 27:19	argent 18:1	attorney 5:22	bases 21:25
30:24 38:16 41:3	argue 49:14 56:21	6:11 14:22	basically 10:13
43:25 45:5,5,10			20:16 37:12

[basis - claim]

Page 3

basis 35:14 40:2 60:18 63:12,17	36:11 43:11 56:2 66:25	buying 41:2 c	chaitman 10:25 11:2,4,4,5,20 12:4 12:20 13:1,7,10 13:21 14:7,14,17 15:7,11,13,21,23 16:3,19 17:6,11 17:18 18:2
bates 12:13,14	blmis 14:6 20:21 33:11 34:14 39:10	c 5:1 8:1 39:4 43:14 68:1,1	challenge 49:20
behalf 11:5 39:7	39:19 44:18,24	cadogan 28:16,20 43:5,13 61:13	chance 40:22 41:5
belief 39:10 43:20 47:5,8 66:15	47:18 48:22 59:13 66:24	cadogan's 43:15	change 28:7
believe 18:4,6,15 23:25 35:24 36:8 39:19 41:24 47:8 54:15 65:17,18	blown 9:7	calculate 51:22	changed 42:13,15 42:19 63:21
believed 39:15 40:3	bmp 40:17	callback 14:8	characterization 31:9
belle 54:12	bnp 20:18 40:16 43:23 45:9 50:6	callbacks 17:14	chart 59:2,4
bench 8:12	board 29:11,15	caraballo 12:7,12 13:2 14:10	chase 12:16 13:24 16:8 40:3
benefit 23:9 24:24 25:4 31:18 33:2 34:13 37:19 53:14 53:19 54:8	bother 10:19	careful 65:13,18	check 29:13
benefits 30:4,15	bowling 3:14	carl 6:8	chelsea 5:19
bermuda 26:23 26:25	box 28:17 29:13	carol 2:9,20 4:5	cherished 31:14
bernard 1:6,12 2:5,6,15 14:23,24	boys 16:21	case 1:3,9 2:2,12 3:2 4:1,5,8,11 10:9 18:21 19:14 19:18 20:22,24	cherry 23:18
bernstein 3:22	brenda 28:3	22:8,25 23:21 30:18 31:3,5 32:23 40:16,17	choice 63:22,22
best 31:3	brief 10:11 31:4 47:4 51:10,16 55:21 66:19	46:19 55:11,16,22 56:8 57:2 64:5,8	chris 36:14
big 19:14 41:2,6 44:19 60:3	briefing 40:8 53:12	caselaw 36:11	christopher 6:17
billion 31:21 51:3 60:2,3	brings 17:7	cases 18:5 22:17 23:17 31:6 37:23	circuit 18:11 24:2 36:11
billions 51:12	broad 9:19 25:17 26:13 33:12 50:25	44:6 45:2 50:6 59:3,20 60:14	circular 57:23,25 59:22
bills 42:13	51:2,5,7,12,25	cayman 48:3	circumstances 33:3
bit 53:3,3	52:16 58:8,15 60:2	cease 63:20	circumvent 19:9
black 28:17	broker 18:25 62:24	central 29:15	citation 20:24
blind 26:16 29:5 29:19,24 30:2 31:9,25 38:14 47:15,24 48:2 49:12	brokerage 40:2	certain 12:4 60:5	cite 20:18 27:8 30:9 39:20,23
blinded 21:16 30:22	brown 5:9,17	certainly 16:13 25:21 44:6 45:2 46:24 55:15 57:14	41:12 44:7 45:2 48:18
blindness 20:14 21:21,24 26:18 31:6 32:10 36:9	bubble 44:10	61:24	cited 20:22 31:4 41:17 46:4 50:6 61:22
	buckley 28:3,11 30:1 61:9,21	certification 12:19	citibank 60:19
	built 25:22	certifications 12:21	citing 22:11 64:7
	bullet 32:1	certified 68:3	claim 11:12,15 51:3,4 59:11,12
	burden 18:3 19:19		
	business 15:25 16:6,11,20,22,25 17:4,5 38:6 44:2 44:22		

[claim - court]

Page 4

60:3,4	complete 9:7,8	connection 18:25	66:13
claimants 57:3	concede 50:22,23	19:21 34:10 43:17	counter 42:8
claims 45:25,25	51:11,14,18	45:23	counterparties
50:10 51:12,15,20	conceded 50:19	consciously 31:20	44:15,19
52:3	51:25	consider 27:11	counterparty
clause 49:7	concern 23:13	35:22 42:22 45:22	44:14,18,22
clear 10:11 18:14	29:3,16 44:24	45:24 62:1,2	country 68:21
19:15 27:24,25	64:2	considered 25:8,9	couple 40:7 41:10
38:20,23 40:2	concerned 24:20	46:11 62:6,25	43:3 46:12
57:10 64:21	26:18 27:7 29:10	consistent 36:10	course 13:24
clearly 16:9 18:19	38:5 44:21,22	consistently 39:9	26:22
18:21 19:4 42:17	concerns 32:9	consolidated 2:5	court 1:1 3:13 8:3
clerk 8:2,5	43:14,17,25 44:14	constitute 21:6,18	8:6,14,24 9:4,8,16
client 58:7,7	44:15 45:8,16,21	constitutional	10:2,4,13,18,24
63:18	48:20,20 66:6	17:13,16	11:1,3,11,24 12:9
closed 34:13	conclude 11:25	constructive	12:13,17,22 13:6
collage 36:17	35:18 36:23	32:15	13:8,14 14:5,12
collateral 24:24	concluded 38:23	contain 14:3	14:16,19 15:9,12
26:2,5 32:12	67:13	contend 12:8	15:20,22 16:2,15
34:10,12,24 35:5	conclusion 39:1,6	contest 19:1	16:24 17:7,15,20
35:5,18 36:1	conclusions 18:16	contested 18:24	18:3,4,12,14 19:5
49:16,17 53:8	concrete 9:23	context 50:7	19:9,17,24 20:5,8
55:24 56:16	17:17	continue 30:2	20:17,19 21:2,3,4
colleague 37:11	conduct 48:12	32:2	21:10,13,20 22:1
52:22	conference 4:13	continued 65:5	22:3,6,8,13,15
collectively 15:1	8:7 10:6,15	continuing 15:2	23:1,5,16,21,23
come 9:10 42:10	confess 57:17	30:3 31:13	24:7,14,16,23
60:23	confirm 63:8	contract 19:1	25:14,16,20 26:4
comes 56:1	65:24 66:9,10	contrary 30:14	26:7,11,22,25
coming 60:19	confirmation	control 18:20	27:3,11,14,16,23
commission 65:12	29:25 32:3	controls 47:21	28:8,23 29:4,7,19
committees 29:15	confirmations	conveyances	29:24 30:16 32:5
companies 50:3	28:15	59:23	32:9,21 33:7,11
company 50:8	confirmed 47:20	copies 39:25	33:14,25 34:2,6,8
complaint 27:9	confirms 28:10	copy 13:11,12	34:9,18,25 35:3
29:1 43:9,12 45:9	conflating 31:17	corporate 8:17	35:16,18,22 36:3
46:4,5 50:17,19	48:4	corporation 6:19	36:5,12,16,22
50:20 51:25 52:19	confused 60:13	correct 24:3 35:2	37:3,7,10,16 38:3
54:6 58:22 59:2	confusing 48:4	61:2	38:21 39:2,5
62:13 64:3 66:22	confusion 32:10	cost 44:16,23	41:18,21 42:1
67:6	congressional	could've 12:24	44:3 45:22 46:5,8
complaints 11:6	30:12	counsel 8:17	46:17,22 50:13,17
27:12,18,19		20:10 42:2 47:7	50:20 51:16 52:5

[court - district]

Page 5

52:13,17,23,25 53:5,10 54:7,11 54:14,17,20,24 55:5,10,14,17,25 56:11,15,23 57:5 57:8,12,16,21,25 58:3,9,16,21,24 59:7,9 60:9,11,24 62:1,4,6,9,13,15 62:21 63:6,11,14 64:24 65:23 66:1 66:3,8,20 67:7,10 court's 11:8 21:10 courts 45:3 covered 43:23 53:8 55:22 57:1 crashes 41:8 create 64:12 created 25:9 59:4 credible 16:25 40:18 credit 29:15 39:24 45:13,16 58:11 59:11 cremona 7:10 criminal 21:24 crisis 30:11 critical 46:21 cry 63:14 culpable 24:4 curious 32:21 current 53:16 custodial 1:20,21 13:8,18 14:1,3 custodian 12:24 13:4 26:19 42:23 42:23 63:19 65:18 66:10 67:3 custodians 65:7 custody 22:22 23:1,4 26:20 29:10 38:9 47:9 64:4 65:22	customer 19:2 28:6 60:2 66:16 customers 16:9 19:4 47:6 cut 40:3 d d 8:1 39:21 43:14 d.c. 6:21 daily 35:13 40:2 data 14:9 date 8:9 54:2 68:25 david 7:13 davis 8:19 11:2,4 days 39:23 dead 61:5 deal 26:7,11 48:4 49:1 64:20 dealer 18:25 62:24 dealt 17:21 dean 18:13 debate 64:18 65:10 debtor 1:7 18:20 19:6,7,12,12,20 59:25 60:15,21 deception 18:9 decide 11:17,18 12:1 19:17,21 44:3,4 decided 28:20 44:7 45:3 decision 20:19,23 32:7,25 34:6 37:2 47:23 53:22 55:2 56:7 61:19 67:10 decisions 11:8 declaration 13:2 13:18 14:10 39:4 39:21,24 48:18 64:16,25	declarations 12:7 declined 43:7 decreased 48:13 defendant 2:10 6:11 21:5 24:18 31:10 60:20 defendant's 20:14 24:19 33:17 35:25 defendants 1:23 2:24 3:10 8:17,19 14:9 20:25 21:9 21:16 22:11,20 27:25 31:7 32:24 33:4 34:13 36:15 44:2 53:2 59:3,6 60:22 61:17,23 64:16 defense 36:17 52:22 53:3,4 deferred 14:22 17:2,3 definitely 67:5 definition 37:18 degree 66:23 deliberate 18:6 24:4 27:7,10 deliberately 23:15 31:8 delivery 35:4 demonstrates 66:23,25 deniability 31:15 deny 37:15 48:9 48:15 49:16 depending 21:18 deplete 57:24 depleted 59:24 depletion 53:4 57:20 59:14 60:8 60:12 deposition 15:24 deputy 48:13	describe 28:17 described 43:8 describing 36:19 designed 13:19 desire 48:24,24 desk 20:4 determination 21:13 determined 11:22 deutsch 5:21 developed 21:24 devices 48:4 difference 11:16 22:15 33:24 37:1 37:7 56:1 differences 9:1 different 8:21 32:5 33:25 35:16 43:14 49:8,25 51:24 difficult 22:19 dilemma 28:17 diligence 27:20 28:1,9,24 29:8,14 29:17 38:18,19,19 39:15 45:15 47:14 47:16,20,21,23 61:7,15 diminution 36:18 direct 35:25 directly 35:14 directors 29:11 discussion 32:9 dismiss 4:6,9 11:6 44:5,7 45:4,23 dispute 41:14 47:16 56:25 disregard 31:5,7 31:19 distinction 35:12 distribute 52:1 district 1:2
--	---	--	---

[document - fall]

Page 6

document 15:10 15:15 41:16 42:3 42:25	earning 40:22 easier 35:6 56:21 economic 40:18 40:25 41:9 48:25 49:4	et 4:5 evaluation 45:7 eventually 40:22 evidence 11:21,25 12:5,23 13:3,19 14:17 15:10 16:21 18:19,21,22 19:14 49:11 52:19 65:20	explaining 50:6 explains 31:23,24 exposed 26:3 44:19
documents 12:4 12:12,15,23 13:15 13:17,19,22,24 19:25 39:18 40:13 41:12,21 42:4,21 43:6,19 44:11 45:13,22 46:3 48:18,19 61:18,22 62:18	economically 42:25	exact 18:16 39:10 47:25 62:19	exposing 31:13 exposure 25:10 38:24
doing 16:9 23:14 23:14 24:1 27:9 39:14 43:1 44:22 60:22 63:9	ecro 3:25	exactly 14:7,7 18:14 21:4 22:23 24:1,13 49:18	extensive 47:16 extremely 38:20 62:22
dollar 52:6,6,7,7	effect 58:17	example 12:6,7 19:11 43:23	eye 29:20,24 30:2 31:25 38:14 47:15 47:24 48:2 49:12
dollars 51:12,21 51:23	effectively 39:9,13	excellent 38:25 61:12	eyes 31:10
dominion 18:20	element 31:18	exception 20:24 42:7 56:8	f
double 28:12 36:20,22	eliminated 64:10	exchange 49:17	f 1:18,20 3:21 42:5 48:18 68:1
drag 49:8	elizabeth 7:7	excluded 13:16	fact 15:14 16:13 17:1 18:7,15,23 21:16 23:7 24:19
draw 47:2	email 62:16	excuse 53:13,24 54:19	30:10 31:8 42:4 45:12,16 48:13 49:10 51:5 60:22 61:17 64:13 67:4
drew 47:2	emails 27:8	executed 39:7 48:11	facts 17:3 21:18 31:4,11 45:10,12 45:19 46:21 67:6
dubinsky 16:24	employees 22:20 24:20 43:16	executing 39:20 40:4	factually 11:17,18 38:15
dubious 21:8	ended 8:9 9:9,11 50:25	exhibit 39:4,21,25 40:14 42:5,11 45:17 46:1 48:18	fail 40:21
due 27:19 28:1,8,8 28:23 29:8,13,17 31:16 61:7	engaged 63:16 66:15	exhibited 26:17	failed 17:9 44:20
duty 48:10,12,21 64:10	engaging 41:20 44:25 65:21	exhibits 14:20,21	fair 46:10 57:16
e		exist 43:2	fairfield 3:8,8 4:11 5:4,22 8:5,5
e 3:21,21 5:1,1,15 5:19 8:1,1 14:9 20:23,24 32:17 33:18 35:23,25 36:20,23 37:4 39:25 45:17 54:25 55:12,16 56:9,16 68:1	entity 50:2 51:12 53:17	existence 61:20 64:6	faith 20:20 21:7 21:19 26:19 36:17 40:8 41:11 43:4,4 46:13
earlier 27:12,17 27:19	equity 59:11,12	expect 38:24	fall 41:5 65:11
	essential 13:25 30:1,1	experts 12:11 66:4	
	essentially 30:19	explain 8:18 37:11 44:14,17 50:16	
	estate 36:18 53:4 57:20,24 59:14 60:4,7	explained 31:3 48:8	

[familiar - griffin]

Page 7

familiar 57:17	formed 15:17,19 15:22,24 16:1,5,7	g	51:6 61:4,19 64:11,14
far 63:14	forms 50:1 51:24	g	gold 62:9
favored 49:6	forth 36:8		goldman 44:16
fee 41:6	fortis 1:18,20 7:2 22:20 24:18 28:6 28:10 42:22 43:5 43:16,17 47:5 53:13,14 58:18 60:18 63:23 66:14 66:23		good 8:3,4,6 10:25 11:1 20:9,20 21:7 21:19 36:13,16 40:7 41:10 43:3,4 46:13 52:24,25
feed 61:5	fortis's 28:14 46:1		gotten 52:16,18
feeder 31:22	forward 54:3		government 15:5 17:1
feel 18:10	found 16:24 29:20 37:1 40:18 43:10 49:22		grant 31:22
fees 30:18 40:11 40:12,14,16 41:7	fraud 16:12 21:17 21:20,22 22:6,8 22:16,16 23:6,6 23:11,17,23 24:6 24:9 38:1,1 41:13 41:13,15,20 46:16 47:13,13 49:8,12 56:22 61:18 63:16 66:24 67:2		granted 51:12
fifth 5:23	fraudster 42:24		great 44:10 61:14
file 57:4	fraudulent 12:8 22:5,7 31:14 32:15		green 3:14
filings 59:23	front 23:19 63:1		greenblatt 12:10 12:10
filtered 44:1	full 9:7		greenblatt's 12:14
financial 30:11,13 31:12,25 37:18 53:22,25 54:4,9	fund 1:18,21 25:9 25:17,17 26:13 31:22 33:12 34:15 34:16 52:8 58:5 59:5,10 65:6,16		greenwich 3:8 4:11
financing 28:6 62:23 63:5	funds 11:9 65:11		griffin 7:6 20:3,7 20:9,10,18 21:3
find 43:20 62:9	further 42:9 47:20 60:10 67:9		21:12,14,23 22:2 22:5,7,10,14,18
findings 18:15	futile 20:13		23:3,13,20,22,24 24:12,15,17 25:2
finds 34:9			25:15,18,21 26:6
finish 30:19			26:8,15,24 27:2,6
first 8:8 26:2 32:18 45:6 50:24 51:8 53:3			27:13,15,21,24
fischbach 31:3			28:10,25 29:6,9
fit 65:7			29:23,25 31:1
five 32:13			32:8,18,22 33:9
flags 43:10,14,22			33:13,21 34:1,5,7
fletcher 6:1			34:17,22 35:2,11
flow 51:7			35:17,21,24 36:4
fmm 28:20 44:1,9 44:10,11,13,21,24 45:15			36:7 38:4 55:7,13
fmm's 61:13			60:11,13 61:2
focus 25:23 32:24			62:3,5,8,11,14,16
focused 9:1 32:23			62:22 63:10,13,17
foerster 6:4			64:25 65:25 66:2
follow 8:21			66:7,18,21 67:8
foregoing 68:3			67:12
forget 34:15			
form 50:11			

[gross - initial]

Page 8

gross 53:25	hearing 4:1 43:7	64:9,11,22 65:2	imputation 44:4,8
grounds 11:7	heart 64:6	65:21 66:18 67:8	45:1
group 3:8 4:12	hedge 25:9,19	honor's 20:23	incentive 40:18
guarantee 28:13	hedged 42:14	40:10,20	incentives 30:13
guess 23:24 26:13	held 17:19 18:20	hope 9:13,13,21	included 12:15
32:14 33:12 34:15	30:3 33:22 34:4	hopefully 9:22	61:23
36:7 38:12 55:19	45:9	hoping 9:25 62:9	including 54:24
56:12 58:17 60:13	helen 11:2,4	horn 58:4 59:25	inconceivable 41:8
61:4	hey 27:10 63:25	horse 61:5	inconsistent 60:5
h		houston 7:4	increased 25:20
h 1:11 2:4 6:8	high 46:16,17	how'd 25:14,16	incredible 40:23
half 40:16,17	47:11 63:15 65:20	huge 31:17	indemnification 49:5
hanson 63:21	66:12,17,23 67:2	hundred 51:22	independent 24:21 28:5,11,15
happen 41:7 50:5	highlight 67:1	hundreds 51:20	29:2 61:9,10 63:3
happened 15:25	highly 66:22,25	hunt 18:13,13	independently 42:7 57:22
49:7 50:16 51:18	hindsight 64:12	19:8,13,23	indicated 19:14
happening 42:18	history 14:24	hyde 4:25 68:3,8	indicates 39:8
64:5	hmm 8:14,24 16:2	i	indiscernible 13:15 19:25 26:1
happy 37:23	33:13 62:21 64:24	i.e. 20:21	26:14 36:21 39:2
64:25	hold 10:11	identify 12:24	41:20 42:15 44:15
harbor 32:13 34:3	hon 3:22	ignorance 24:5	50:13 51:4 52:11
56:9	honor 8:12,25	ignorant 31:8	52:12 53:17,20
harbored 33:14	9:12 10:10,17,22	impacts 18:8	54:1,3,5,16 56:7
33:18,18 34:20,23	10:23,25 11:6	impart 59:5	56:24 57:4,11,18
35:9,10,19,23	18:13 19:23 20:3	implausible 41:8	58:15 64:8 65:15
harbors 32:11	20:9,11,19 21:4	implemented 39:9	individual 25:25
33:20 56:5	21:15,23 22:10,25	implementing 39:11,13,16	26:1 40:1
harley 39:8 42:6	23:14,24 24:12,15	implicated 16:15	individually 2:20
42:12 43:17 48:3	24:17 25:2,6,21	16:17	2:21 11:10 19:11
62:24 63:4	26:15 27:6,13,22	implicitly 54:9	individuals 30:12
harley's 42:12	28:25 29:9 30:8	implies 28:13	inference 45:7,10
harris 6:17 36:14	31:2,16 32:18	important 17:12	inferences 47:2
36:14,25 37:4,9	34:5,22 35:11,24	18:10	information 17:1
37:11,17 38:15,22	36:7,14 37:9,21	importantly 57:24	28:4,19 61:9,15
39:3,6 41:19,24	37:22 38:15,23	impose 48:12	63:2 64:4 65:24
42:2 44:6 46:3,6,9	40:18 41:11,14,24	imposed 26:25	initial 8:16 33:7
46:19 50:15,18,22	45:9 46:3,13	27:3	33:11,15,15 34:9
51:17 52:9,14,18	47:15 49:4 50:6	impossible 29:17	34:11,16,18,25
61:6	50:15 52:21,24	38:7 39:12	
hear 23:11	54:19 55:4,20	improper 65:7	
heard 10:4 40:9	56:6,18 57:10		
40:11	58:13,23 59:17		
	60:13 61:3,6,19		
	62:5,17 63:10		

[initial - liable]

Page 9

35:3,7,8,13 36:24 37:5 53:14,18 54:5 57:8,18 injury 17:17,18 insisted 28:3 instance 46:1 instances 48:13 institution 30:15 31:25 institutions 30:10 30:13 insulate 16:10 insurance 25:8 integrated 59:19 59:21 intent 12:8 13:10 intentionally 40:20 interim 38:19 internal 39:20 invest 24:23,25 29:21 40:10 63:12 invested 21:9 30:24 40:20 58:14 58:18 60:25 investigate 48:10 48:21 investing 25:17 26:12 34:19 41:4 42:13,14 44:13 investment 1:6,12 2:6,15 14:25 16:8 16:11,20 17:5 28:17 30:17 42:12 52:6 53:20 58:7 58:11,12 59:12 62:24 65:7 investor 6:19 26:2 investors 25:23,25 65:16 invited 9:15 involve 9:14	involved 21:17 38:17,17 ireland 1:18,19,20 1:22 4:2 irrelevant 33:5,23 64:20 irrespective 65:13 irving 1:11 2:4,14 11:8 issue 11:22 18:14 19:16 29:13 36:19 37:25 54:20 55:8 issued 12:11 issues 8:22 9:2 10:1 11:21 17:21 18:16 19:21 54:22 64:12 items 49:8 itnually 34:15	63:21 jurisdictional 11:22 jurisdictions 28:7 30:5	49:3 56:3,8 known 30:21,21 46:21,22,25 47:12
		k	I
		k 1:18,20 6:20 katz 21:4 25:3,6 30:3 36:10 kazanoff 5:15 8:16 9:5,6,12,17 10:3,10,17,22 keep 11:3 24:8 25:12 35:19 41:7 keeping 60:21 kelley 6:23 kept 52:15 56:11 kevin 6:16 36:17 53:1 key 29:13 kimba 31:2,23 kind 21:17 23:11 50:9 knew 16:13,13 30:20 56:21 know 9:13,14,19 13:21 15:7 17:6 18:5 19:9 20:25 jr 6:8 7:11 judge 3:23 13:10 13:21 15:7,13,17 17:6,12 21:25 22:3 24:6 25:2,7 30:3,23 31:2,23 32:6,23 33:21 34:3 35:14 37:1 37:13 49:22 53:10 53:11,21 54:7,21 55:1 56:6 64:7	I 1:6,12 2:5,6,15 6:16 7:6 14:23,24 lack 4:6,9 20:20 21:7,18 language 32:25 33:10 61:18 66:14 67:4 largest 14:24 latest 65:17 latham 6:10 36:15 53:1 law 18:16 19:9 21:24 32:14 35:6 45:3 64:10 lawyer 65:9 leading 47:23 learning 48:24 leave 4:3 20:12 led 35:8 ledanski 4:25 68:3 68:8 left 52:7 legal 20:15,17 21:13 22:11 28:7 58:17 64:18 68:20 legislation 65:17 65:19 legitimate 16:22 lehman 44:19 lender 30:19 letters 16:14 leverage 44:16,23 49:20 53:20 leveraging 58:6 levy 7:11 lexington 5:12 liability 48:20 liable 26:18 30:6 32:14
		judgment 11:19 july 28:10 jurisdiction 4:6,9 11:7 18:3,4,8 27:4	knowledge 20:20 20:21 21:6,21 37:25 45:10 46:15 46:15 48:5,6,10

libor 40:15,16,17	66:19,21 67:5,6	management 43:5 45:7 63:23	mens 23:15
licensing 65:5,6	looking 14:20 30:4 59:19,20,21	management's 43:18	mention 41:12 43:4,5 45:15,15
limited 1:19 54:17 54:25 55:8 57:3	62:7 64:13	manager 65:7	merits 11:12,15 19:18
line 29:15	looks 43:15	managers 30:17	met 47:17 65:5
liquidation 1:12 2:5,14	loose 67:4	mandate 39:8,11 39:13,16	mh 8:14,24 16:2 33:13 62:21 64:24
liquidator 9:15	lose 12:1	market 17:4 25:17 26:13 33:12	microphone 20:6
liquidity 44:16,23	loser 60:3	50:25 54:1 58:8	million 24:23,25 26:12 30:20 34:3
list 43:15,20,21	lot 13:15 27:19 30:17 51:6,6	60:2	35:4 40:11,21,22
listen 9:21	54:21	marketplace 31:25	49:21 51:3,23
litigate 64:12	lots 45:2	material 18:7	52:3,6 53:8,23
litigating 18:5	lottery 41:2	matter 1:5 4:6,9 15:14 18:18 24:3	54:1 55:24 59:5,6 60:4
litigation 50:10 51:15,20		27:16 38:2 41:16	millions 51:21
little 26:19 53:2,3		45:3 48:15,16	mimed 25:18
llc 1:6,13 2:6,16 11:14,25 12:1 14:18,25 15:5,17 15:19,22,24 16:1 16:5,7,7,18,21,23 17:22,24,24 18:19		55:19 65:10 66:5	mind 20:3 26:9 32:11 37:5
llp 5:11,21 6:10 11:5		matters 48:16	mindset 33:5,22
loaning 30:19		mccallum 7:7	mineola 68:23
loathe 9:9		mean 9:6 11:15 27:13,15 55:9	minima 48:25
loewenson 6:8		57:25 65:23 66:11	minimize 25:5,9 25:12,14,16 30:5
logic 35:24		meaningful 28:18 28:19 61:15	minimizing 26:9
logically 11:22 15:16		means 36:20 44:15,18,18 46:20	miniscule 40:15
long 9:4 18:9 19:15 20:5 28:18 30:14 57:18 62:4		46:20	misappropriating 47:6 66:16
look 15:16 16:14 18:2 19:17 20:23 24:7 26:21 27:8 27:17 32:25 33:10 40:13 41:11 42:4 42:5,11 43:12 44:9,12,17 45:13 48:7,17 51:10 54:24 61:18,25 62:11 64:15 66:6		meant 56:20	misdirect 64:11 65:2
		mechanism 49:2	misrepresentation 18:7
		mediation 8:10,23 9:7,8,17,19,22	modicum 31:15
		mees 43:16	mohan 7:12
		meesprierson 43:5	molten's 9:18
		meet 20:14	money 23:8 24:25 26:3 29:22 52:1,1
		meeting 8:16,19 8:21	52:7,16,18 58:5
		memo 38:19 43:16 45:13,16	58:17 59:15,16,23
		66:13	59:24 60:15,21,25 60:25

[months - people]

Page 11

months 54:2	25:8 29:1,2,12	oh 19:25 57:12	p
morning 8:3,4,6	38:7,12 50:5	62:12	p 5:1,1 8:1
10:25 11:1 20:9	59:14	okay 9:16 10:2,9	page 39:6,7 40:14
36:13 52:24,25	new 1:2 3:15 5:6	10:15,21 18:12	45:18 47:3,4
morrison 6:4	5:13,24 6:6,14	20:7,8 21:20	51:10
motion 4:3,6,9	45:17 48:8,11	24:14,15 27:23	paid 51:21 58:12
11:17 17:8 20:12	nicholas 7:10	29:4,19 34:1	60:3
27:17 44:5,7 45:4	non 17:16 31:24	35:17,17 36:4,7	papers 30:10 36:8
45:23	normal 49:5	37:10,16 39:5	53:16 54:13
motivated 31:10	nos 4:13	46:25 48:17 53:5	paragraph 14:23
motive 31:7,17	noted 37:13 47:15	55:14 56:23 57:5	43:13,15 44:12
40:25	notified 16:6	57:16 58:21 59:7	51:17 59:2 62:11
move 23:10 57:19	notify 16:7,8	60:9 62:11	62:20 65:11 66:19
moved 11:6 26:21	november 10:7,14	old 68:21	66:22
26:22 27:4	10:16 39:24 45:14	open 8:9 9:9,11	paraph 44:17
mullarney 5:19	45:14	31:10	paribas 20:18
multi 43:5,18	novo 64:2 65:8	opined 12:12	part 12:5 15:3,3
63:23	number 11:20	opportunity	19:18 26:4,4,8
n			45:6
n 5:1 8:1 68:1	13:3 37:22 40:20	31:17	participant 37:18
n.w. 6:20	67:1	opposed 35:7	53:22,25 54:4,9
narrow 8:22 9:3	numbers 12:13,14	64:13	participants 33:4
10:1	numerous 43:11	opposite 39:10	33:22
nathanael 6:23	nutshell 32:22	42:5 47:25	participate 31:13
nation 49:6	ny 3:15 5:6,13,24	opposition 10:12	63:12
need 9:10 13:8,9	6:6,14 68:23	optimal 22:24	particular 8:25
22:24 25:23 62:25	o	61:19 64:5	41:15
65:13	o 3:21 8:1 68:1	option 50:4 62:25	parties 8:13,21
needed 12:23 13:3	objective 28:14	65:25	21:11 43:4,6,25
32:4	observations	options 42:8	57:1
negligence 46:24	43:18	order 10:7,18	partner 61:13
47:3,7	obtain 28:15	16:9 35:1 54:24	party 15:7 49:9
negotiated 49:9	53:20	oren 5:8	passes 60:16
neither 25:10 48:5	obtaining 48:10	organization	patrick 7:12
nektalov 24:2	obviously 15:8,18	28:21	pay 23:8 26:12
nelson 2:9,20,21	54:25	original 12:21	58:24
4:5,8 10:24	occur 39:12	13:5 17:7 46:5,6	paying 59:13,15
nelsons 11:5	occurred 33:6	49:10 59:1	payments 34:10
neophytes 31:24	51:11	overall 65:15	34:12,12,23
nervous 63:24	october 8:20	owen 8:11	people 18:9 23:6
net 59:10,11 60:3	odd 33:19	owns 14:12,14,18	29:1,14 30:9
never 12:20 13:25	offered 14:21 15:9	18:18 19:10	38:17 42:21 48:17
16:4,20,21 18:24	office 63:1		60:18,23 64:13

[people - question]

Page 12

66:8	point 10:7 18:17 23:3,10 25:6,11 37:24 44:8 46:13 47:14 48:1 49:1	preview 37:1 priced 42:7 pricing 63:25 prime 1:18,21 34:15,16 58:5 59:5,10	protect 16:10 56:15 protection 6:19 16:5 19:3 32:1 48:4 protections 25:22 25:24
percent 40:15,15 40:17 41:6 42:13	pointed 25:7 35:14 48:14 49:5 61:7 66:13	prior 28:24 53:12 private 25:17 pro 1:14 4:13 probability 46:16 46:17 47:11 63:15 65:20 66:12,17 67:2	prove 11:13,14 17:9 18:3 proved 11:12 provide 13:12 28:6,22 49:20,24 59:5
percolated 44:23	points 8:8 40:7 41:10 43:3 46:12 50:23	probably 13:22 66:24	provided 13:11 19:3 28:5,14 49:14,17,24 60:6 63:3
performance 26:13	ponzi 14:24 20:21 21:1,9,21 22:16 25:1,8 30:22,25	proceeding 15:8 proceedings 67:13 68:4	provides 10:20 39:25
period 13:23 38:18 39:19 40:5	32:2 38:1 39:11 40:21 41:4,15 42:23 43:21 44:24 46:15 47:12 60:23 61:2 64:6	procured 12:8 procuring 25:12	providing 63:20
perpetrating 16:11	portfolio 39:22 42:7	produced 12:12 12:16,17,21,24 13:15,17,22,25	provision 36:1
person 41:17 42:17 61:21	portion 52:2	production 12:21 13:5 14:2	pull 24:25
personal 17:23 19:7 23:8 30:13 31:18	position 31:12 54:1	productions 14:8	pulled 64:19
peter 5:15	positions 28:13,16	profile 42:16,18	purportedly 12:15
petition 54:2	possibility 62:19	profitable 31:12 31:21	purpose 15:11 34:19
phenomenon 28:18	possible 18:11 28:12,15 32:16	profits 25:4,4	purposes 32:20 54:4
picard 1:11 2:4,14 3:4 4:1,5,8,11 7:2 10:24 11:9 20:2	possibly 62:23	progressing 10:9	pursuant 55:9
picking 23:18	post 17:21 18:15	project 30:7	put 12:5,9 13:3 25:24 36:8 54:3
pitches 42:23	practice 61:24	prompted 65:8	putting 10:11 58:16
pitching 42:22	pre 17:21	prong 49:15 51:8	q
place 24:22 31:11 33:23 51:10	predated 14:10	proof 19:19 32:1	question 9:20 14:12,14,19 17:8
plaintiff 1:15 2:7 2:18 3:6 21:11	predecessor 14:25	property 19:2,3,7 19:10	17:21 22:1,19
planning 37:21	preference 35:6	proprietary 17:4	23:24 24:8 31:8
plausibility 21:8	premised 20:15	proprietorship 16:16	32:5,20 33:25
plausible 31:10	present 65:12	prosecution 14:22 17:2,3	35:16 36:24 40:10 45:1 55:10 56:12 64:9
plausibly 30:24	presented 18:23		
plaza 5:5	preserve 37:14		
plead 24:10,13,18 31:2 56:3,4	presumably 35:9		
pleaded 67:6	pretty 19:15		
pleading 21:8 31:19			
please 8:2 11:3			
pled 20:13 36:9			
plus 51:3			

[questioning - right]

Page 13

questioning 41:22	reaping 31:23	reducing 49:22	requirements
questions 9:18	reason 13:16	refence 54:21	27:5 56:20 65:5,6
36:18 43:18 47:18	35:25	refer 14:6	requires 31:17
52:21 60:10 61:19	reasonably 52:11	referenced 59:3	reserve 67:10
64:3 67:9	reasons 36:8	refers 20:20 50:20	resign 63:22,22
quickly 18:11	44:25	regard 64:9	resolve 9:25 11:17
49:14 61:4	recall 46:2	regina 7:6 20:9	11:18 29:12
quote 28:12 34:12	receive 38:10	regs 64:23	resolved 24:16
34:13 38:25 39:7	received 18:24	regulations 27:4	resonance 39:20
41:17 42:6,15	19:2 39:23 60:4	64:16	respect 31:16
43:15 44:13 46:20	receives 42:6	reinvested 58:10	32:12 33:3 56:22
r			57:2 64:10
r 3:21 5:1,9 8:1	recipient 37:5	related 49:8,16	respectfully 32:19
68:1	reckless 31:5,6,19	relating 22:16	respond 9:5
raise 18:16	recklessness 46:23	35:4 56:16	response 40:9,11
raised 11:21	recognized 15:18	relationship 15:2	40:24 60:11
raising 37:25	53:21	15:4 45:18 47:22	responses 59:18
rakoff 21:25 22:3	recollection 42:1	relevant 37:6	responsibilities
24:6 25:2 30:3,23	recommended 42:22	38:18 40:5 65:3	65:14
33:21 34:4 35:14	reconciled 47:19	relying 46:2	responsibility
37:1,13 49:22	reconciliation 28:5 42:9 63:3	remaining 31:8	65:15,16,18
53:10,11,21 54:7	reconstruct 39:22	remember 59:2	responsible 65:19
54:21 55:1	reconstructed 61:8	rendering 31:9	result 39:15,17
rakoff's 32:6 56:7	record 12:6 13:2	repeat 34:5	48:23
ran 14:23	28:18 61:12,14	repetitive 66:18	resulted 38:19
rational 41:9	68:4	replaces 60:19	51:20
42:25	records 13:4 62:9	reply 10:11 40:9	results 9:23
rbs 49:9	recover 11:9 19:5	47:4 51:10,16	return 49:20
rea 23:15	33:15 35:1 57:23	55:21,23 64:21	returned 59:15
reach 11:23	recovery 36:20,22	66:13 67:5	review 13:13 39:7
reaction 27:7	red 43:10,14,22	report 12:9,11,14	46:2
reactions 64:1	redacted 62:23	reported 29:14	reviewed 61:7
read 15:12 32:6	redeem 28:20	63:23	richard 7:11
34:6,21,22 66:9	redeeming 60:18	representation	right 12:3,20
reading 66:20	redemption 34:9	14:3	14:16 19:24 23:20
ready 9:6 19:15	34:11,23 35:8	representing 8:18	23:22 24:13 25:20
real 64:1	49:21 50:21,21	reputation 38:25	29:6 31:1 33:9
realized 16:3	redemptions 23:8	request 8:7 49:9	34:17 36:5,16
really 18:18 24:10	35:15 50:23 58:25	requests 15:15	46:8 50:22 52:10
38:7,9,13 44:4		require 65:6	52:13,17 55:5,20
46:13 56:25 65:3		requirement	57:7 58:3 59:7
reap 30:3		53:17,25	67:7

[rigorous - standard]

Page 14

rigorous 27:3,5 risk 25:5,12,14,16 25:18,20 26:9 30:5 40:10 41:12 41:15 42:15,18 44:14,18,19,23 45:7 46:23 48:5 48:25 49:4 61:17 63:6 risky 30:14 41:1,2 road 68:21 rockefeller 5:5 roger 63:20 role 28:12 rolling 60:18 room 14:9 round 60:14,20 rudnick 5:17 rules 19:10 run 16:21 running 16:16,18 16:19,22,22 23:19 rye 44:13 50:11 51:19 53:18,19,19 53:22 58:6	see 8:12 12:14 19:21 says 14:23 15:1,12 18:21 31:23,24 39:22 42:6,8,12 43:1,15,21 44:12 48:16,21 52:11 64:5 65:10 66:3,4 66:6 schedule 8:8,20 10:6 scheduled 8:6 scheduling 8:15 scheindlin 64:7 scheme 14:24 20:21 21:1,6,9,21 22:16 25:1 30:22 30:25 32:2 38:1 39:12 40:21 41:4 41:15 42:24 43:21 44:24 46:15 47:13 61:3 64:6 scienter 31:18 scope 8:22 9:19 64:18 seanna 5:9 seated 8:2 second 18:10 24:2 28:2 34:24 47:14 49:21 50:9,11 51:14 60:1 secretiveness 38:8 section 53:8,18,24 56:9,9,20 57:1 securities 1:6,13 2:6,15 6:19 14:25 15:1,2 19:1 20:22 21:17 23:12,16 24:11 31:3 41:23 42:3 58:2,8,10 62:19 63:8,16 65:12 66:12	sign 39:18 52:9,14 signatures 10:20 significantly 9:25 14:10 similar 50:12 simply 40:23 47:24 simpson 5:11 single 59:19 sipa 2:5 19:3,5,12 situation 16:4 31:12 41:3,16 60:17 size 49:23 skin 30:17 skip 65:16 smb 1:3,9,14 2:2 3:2 4:1,5,8,11 sole 16:16,19 solutions 1:19,21 68:20 somebody 60:16 sons 16:6,10,10,15 sonya 4:25 68:3,8 sorry 13:7 25:15 38:22 41:13 58:14 sort 24:6,9 28:23 55:18 sought 19:2 sound 66:17 sounds 42:10 southern 1:2 speak 13:19 20:5 52:22 53:2 55:22 specific 49:8 50:7 specifically 22:21 24:1 59:1 speculative 17:16 spread 40:16 standard 20:14,15 20:17 21:24 22:11 37:21 46:14
s s 5:1 6:23 8:1 s&p 42:14 safe 32:11,13 33:14,18,18,19 34:3,20,23 35:9,9 35:19,23 56:4,8 satisfactory 29:21 satisfied 53:24 satisfies 37:18 satisfy 28:1 29:18 38:7,8,13 43:11 53:17 saw 14:1,2,5 57:12 66:24 saying 21:10 22:10,12,24 23:11 23:14 29:7 30:20	seated 8:2 second 18:10 24:2 28:2 34:24 47:14 49:21 50:9,11 51:14 60:1 secretiveness 38:8 section 53:8,18,24 56:9,9,20 57:1 securities 1:6,13 2:6,15 6:19 14:25 15:1,2 19:1 20:22 21:17 23:12,16 24:11 31:3 41:23 42:3 58:2,8,10 62:19 63:8,16 65:12 66:12	sharing 45:20 sheehan 7:13 sheet 57:18 shifting 30:5 shoestrings 61:12 shooting 58:6 short 25:4,4,12 30:3 shorthand 46:18 should've 46:25 show 39:19 45:12 50:19 showed 59:4 shred 14:17 side 44:1 45:11 sides 21:5,15

[standards - tickets]

Page 15

standards 36:10	submitted 61:23	suspicious 29:5	thacher 5:11
standing 11:9	subsequent 33:1,2	swap 26:5,16	thank 10:17,22,23
12:2 17:13,16,25	35:1 38:11 57:14	28:24 30:7 33:4,5	18:12 19:23,24
19:19	60:6	33:23 34:3,10,19	36:12,14 38:22
stanley 2:21	subsequently 42:9	40:5,13 45:24	67:10,12
start 8:9 64:11	65:1	49:2,10,23 53:13	thanks 10:21
started 58:1	substantial 46:23	53:23 59:6	thanksgiving 10:15
state 19:9 26:9	substantially 43:16	synthetic 42:14	theories 33:16
32:14 35:5 37:4	substantively 2:4	t 68:1,1	35:5
59:20	successfully 20:13	take 9:4 12:7	theory 12:2 40:19
stated 20:19	sue 64:2 65:8	30:14 38:10,13	thing 29:3 32:19
statement 17:2	sufficient 28:22	taken 60:25	37:24 41:1 42:20
states 1:1	29:17	takes 60:15	43:19,24 45:5
status 10:8	suggest 9:24 31:6	talk 23:18,18	47:4,7 49:1,6,13
statute 48:11,16	42:5 47:24 48:2	60:14	49:21 51:14
statutes 48:8,9	suggested 63:17	talked 61:5	things 13:3 25:7
stayed 20:3	suggesting 31:4	talking 23:12 24:5	26:1 30:6 48:1,6
stipulation 10:19	suggests 13:2 42:3	33:7,9 34:8 44:4	61:6,25 66:10
stock 49:25 50:1,4	45:20	60:17 62:20	think 8:20 9:1,4
50:7,10	suing 17:13	talks 42:11 43:13	9:21,21,24 11:22
stocks 42:14	suite 6:20 7:3	45:17 48:19	12:6,17 14:5,11
stopped 44:13,22	68:22	task 21:8	17:1 18:2,4,8,17
stops 10:14	sum 34:8	tech 46:19	24:9 30:7 31:16
straits 40:25	summer 9:3	techniques 49:5	32:18,19,22 33:21
strategy 40:4	support 63:4	telephonically 7:9	33:23 39:13 42:10
42:12	supporting 45:10	tell 37:20 40:12	43:1 48:17 55:8,8
streams 24:21	supports 52:20	50:24	56:19 59:17 60:5
28:4 61:10 63:2	supreme 46:22	telling 23:6 66:5	63:7,15 64:7
street 6:5,20 7:3	sure 11:4 22:2,14	tells 40:14 44:12	65:10 66:11 67:8
striking 42:20	32:8 52:23 54:23	46:19,22,24	thinking 30:4
string 62:16	57:10,21 59:8	tenant 2:21,22	thinks 42:17 66:2
strong 6:1	62:3,5	term 25:4,4,13	third 6:12,13 26:2
struck 33:19	surprise 51:5	28:18 30:4,15	43:4,6,25
structure 43:13	surprising 48:25	terminating 31:12	this'll 9:4
stuart 3:22	49:18	terms 9:6 48:1	thought 25:3,5,11
subject 4:6,9	suspect 24:1,4,5	58:13	30:9 32:2 53:10
subjective 47:5	suspected 21:22	test 21:2,3	57:12,12 62:17,18
66:15	22:21 24:9,10,18	testified 15:17,20	64:14,20
subjectively 24:3	25:1 38:5	15:23 16:24	three 23:13 26:12
submit 10:7,18	suspects 41:19	testimony 16:25	ticket 41:2
65:1	suspicion 22:4,9	30:12	tickets 39:23 40:1
submits 20:12	46:16,17		42:6,9 47:19 61:8

[tickets - verification]

Page 16

61:8	transcript 68:4	triggered 48:8	underlying 31:11
tied 35:14	transfer 11:14	triggered 29:3	45:24,25
ties 45:5	15:14,15 17:10	48:24 49:22 55:1	understand 9:12
time 9:10 13:5	19:6,10,20 32:15	tripled 58:7	11:24 13:14,16
15:17,23 18:9	32:17 33:1,8,11	tripping 60:14,20	15:13 19:15 22:18
19:3 22:21 23:25	33:15,16,17 34:9	true 47:2,24 50:3	33:16 37:7 50:13
24:19 26:15 30:9	34:14,18 35:1,4,5	68:4	52:5 55:6 56:6
38:18 39:19 40:5	35:7,8,19,23	trustee 1:11 2:4	63:11 65:3
54:13 59:22,23,24	36:24 37:5 48:2,7	2:14 5:4 7:2 8:11	understanding
60:3 61:14 64:13	48:23 53:14,19	11:13 12:9,20	55:3 56:25 57:9
times 26:12 43:11	54:5 56:16,16	13:23 17:13 18:13	understands
59:21 67:1	57:4 58:1 59:22	20:10,12 21:7	18:14
title 29:11	transferee 33:1,2	33:14 36:9 43:7	understood 36:25
today 20:11 37:12	34:16	51:2 57:22 58:11	undertake 21:8
47:8	transferees 60:6	59:4,9,13,15	united 1:1
ton 61:24	transferred 11:10	trustee's 4:3	unjustified 46:23
track 61:12,14	transfers 12:1,2	12:11 20:11 40:19	unreasonable
trade 39:23 40:1,1	17:23,24,25 18:25	55:6,21	9:24
42:6,9 47:19 61:8	19:4 34:11 35:1	truth 31:5,7	untrue 38:16
61:8,9 63:2	35:13 38:10,11,13	try 8:22 9:3 63:18	unusual 49:4
trades 24:21 28:6	49:15 55:22,25	trying 8:20 10:3	unviable 28:19
28:13,16 39:7,12	57:1,3,5,8,14,18	22:18,19 64:12	unwillingness
39:14,20 43:1	57:23,23,25 59:22	turn 29:19,24	28:21
44:25 48:11 61:21	transform 19:12	31:20,25 47:14	update 10:8
63:4 65:21 66:15	transparency	49:13	updated 28:8
trading 16:22	28:22	turned 38:14	upside 41:3,6
17:4 20:22 21:1	treasury 42:13	47:24	upsize 59:6
22:22 23:12,16	treated 19:6,6	turning 30:2	use 40:20 46:17
24:10,19 39:8,11	tremont 25:23	47:15 48:2 49:12	61:17
39:16 40:4 41:22	26:1 34:18,19,23	two 8:8 19:4	usual 49:7
42:3,10,18 43:22	35:13 37:17,19	24:20 25:7,8 28:4	usually 60:15
47:6,9 62:19 63:8	45:17 47:20 49:19	32:11 33:19 39:22	v
63:15 64:5 66:11	49:22 50:10 51:2	48:1,5 49:15,25	v 1:16 2:8,19 3:7
66:12 67:3	51:19,21 52:1,19	49:25 50:23 51:24	4:1,5,8,11 7:2
training 29:12	54:5,8,8 56:3,21	53:16 56:1 57:4,6	value 49:14,14,17
transaction 28:24	58:5,18 59:10,11	57:15 59:18 61:10	49:20,24 50:1,1,3
30:7 33:4,6 49:2	59:12,16 60:17	63:2 65:1	50:4,4,8,9,12,23
49:10 53:13,24	tremont's 59:10	tx 7:4	51:1,7,9,24 52:11
59:6,19,21	trial 11:21 12:5	u	52:12,12 60:6
transactions	12:22,25 13:9,12	u.s. 3:13,23 14:22	variety 33:16
30:14 34:11 41:1	14:21 18:23	uncomfortable	verification 28:11
transcribed 4:25	tried 10:9 15:19	62:22	29:2

[verify - zero]

Page 17

verify 24:21 48:11 48:12 61:11 64:5 65:4,6 veritext 68:20 versus 10:24 20:2 view 56:19 voice 11:3	william 6:2 willing 29:21 withdrew 54:21 58:5 59:5 wollmuth 5:21 wood 31:2,24 words 11:13,16 23:17 40:19 63:24 63:24 65:9 worked 25:11 working 8:22 9:2 works 61:16 worried 63:25 worth 52:15 worthless 52:10 would've 13:11 14:1,2 51:22 52:16,18 wrap 36:6 write 66:19 writing 42:17,21 written 30:11 wrong 20:15,17 22:11 64:1 wrote 16:14 31:4	z zero 52:15
w		
w 6:1 want 9:11 10:4 27:10 37:24 62:1 63:11 64:17 65:3 wanted 12:22 28:11 44:9 46:12 46:14 49:19 61:10 61:10 warshavsky 5:8 8:4,11,11,15,25 9:5 10:23 washington 6:21 watkins 6:10 36:15 53:1 way 30:8 34:22 38:6 43:12 55:7 61:21 ways 49:25 we've 8:21 9:2,14 11:6 12:9,13 18:5 36:8 61:5 week 13:12 went 58:4,7,8 59:25,25 west 6:5 why'd 24:23,24 willful 20:14 21:21,23 26:17 31:6 32:10 36:9 36:11 43:11 56:2 66:25 willfully 21:16 26:16 29:5 30:22 31:9	x x 1:4,8,10,24 2:1,3 2:11,13,25 3:1,3 3:11 xl 53:18,19,19,22 58:6	
	y	
	yeah 10:13 26:6 27:2 34:1,6 35:17 37:3 57:16 61:14 63:6 year 9:23 10:6 19:4 40:22 years 12:25 56:1 57:4,6,15 yields 9:22 york 1:2 3:15 5:6 5:13,24 6:6,14	